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VERMONT. SUPREME COURT

REPORTS

OF

CASES ARGUED AND DETERMINED

IN

THE SUPREME COURT

OF THE

STATE OF VERMONT

BY

JOHN W. REDMOND

VOLUME 78

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JUDGES

OF THE

SUPREME COURT OF VERMONT

DURING THE TIME OF THESE REPORTS.

HON. JOHN W. ROWELL, CHIEF JUDGE.

HON. JAMES M. TYLER.

HON. LOVELAND MUNSON.

HON. HENRY R. START,
Until his death, November 7, 1905.

HON. JOHN H. WATSON.

HON. SENECA HASELTON.

HON. GEORGE M. POWERS.

HON. WILLARD W. MILES,
Appointed November 29, 1905.

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CASES ARGUED AND DETERMINED

IN THE

SUPREME COURT OF VERMONT.

STATE *v.* ALONZO CARRICK.

January Term, 1905.

Present: ROWELL, C. J., TYLER, MUNSON, START, WATSON, HASELTON, and POWERS, JJ.

Opinion filed June 3, 1905.

Criminal Law—Gambling—Gambling House—Nuisance at Common Law—Sufficiency of Indictment.

The gaming house, or place, which at common law was indictable as a nuisance, was a "common" gaming house, or place; and it was essential that the indictment should allege that the house was a common gaming or gambling house, and, perhaps, that it was kept for lucre and gain.

The repeal of the prohibitory liquor law relating to nuisances, in which gambling was put on a footing with the unlawful keeping or disposition of intoxicating liquor, carried with it that part of the law relating to gambling places.

An indictment which alleges only that the respondent at, etc., "did unlawfully keep a certain place and rooms," situated, etc., "to be resorted to, used, and occupied for gambling, and did then and there knowingly permit the same to be resorted to, used and occupied for gambling by divers persons to the grand jurors unknown, to the common nuisance of all good people of this State," neither charges an offence at common law nor under any existing statute of this State.

INDICTMENT for keeping a gambling place. Heard on demurrer to the indictment at the June Term, 1904, Caledonia County, *Watson,* J., presiding. Demurrer overruled and indictment adjudged sufficient, *pro forma.* The respondent excepted. The opinion states the case.

Harland B. Howe for the respondent.

The first count is bad even at common law. At common law, the indictment must charge the keeping of a "common" gambling house. Haw. P. C. (Cur. Ed.) Ch. 32 § 6; 1 Rus. Cr. (6 Ed.) 741; *In Re Ragier et al.,* 2 D. & R. 431; *Rex* v. *Dixon,* 10 Mod. 335; *State* v. *Haines,* 30 Me. 65; *Rex* v. *Rogier et al.,* 1 B. & C. 272; *Lord* v. *State,* 16 N. H. 325.

Frank D. Thompson, State's Attorney, and *David E. Porter* for the State.

The first count charged the keeping of a common gambling house, and this was an offence at common law. *Rex* v. *Rogier,* 8 E. C. L. 117; *Rex* v. *Taylor,* 10 E. C. L. 166; 4 Blackstone's Commentaries 168; *Lord* v. *State,* 16 N. H. 325, 41 Am. Dec. 729; *People* v. *Jackson,* 3 Denio 101, 45 Am. Dec. 449; 14 Am. & Eng. Enc. of Law (2nd Ed.) 666; 14 Am. & Eng. Enc. of Law (2nd Ed.) 696; *Com.* v. *Bulman,* 118 Mass. 456.

It is sufficient to allege generally that respondent kept a common gambling house. *Rex* v. *Rogier,* 8 E. C. L. 117; *Rex* v. *Mason,* 1 Leach 548; *Rex* v. *Taylor* 10 E. C. L. 166; *Lord* v. *State,* 16 N. H. 325, 41 Am. Dec. 729.

HASELTON, J. This is an indictment in two counts. In county court the case was heard on demurrer to the indictment and each count thereof. The court, *pro forma,* over-

ruled the demurrer and adjudged the indictment sufficient. The respondent excepted and the cause was thereupon passed to this Court.

The State concedes that the second count is bad, and it is so obviously insufficient that we hold it bad without reciting it or discussing it.

The first count charges "that Alonzo Carrick of St. Johnsbury, in the County of Caledonia, heretofore, to wit, on the 25th day of March, A. D. 1904, at St. Johnsbury in said County of Caledonia, did unlawfully keep a certain place and rooms, used as a place of resort, situated at St. Johnsbury, aforesaid, on the side of Eastern Avenue, in the Republican Block, so-called, to be resorted to, used and occupied for gambling, and did then and there knowingly permit the same to be resorted, used and occupied for gambling by divers persons whose names are to the grand jurors unknown, to the common nuisance of all good people of this State, contrary to the form and effect of the statute," etc.

The omission of the word "to" after the word "resort" the second time the latter word is used is a mere grammatical inaccuracy which requires no serious consideration. This count does not, however, charge an offence under any statute now in force and the state's attorney does not claim that it does. V. S. 5125 reads: "A person who sets up or promotes a lottery for money, or disposes of property by a lottery, and a person aiding or concerned in so doing or who knowingly allows premises owned or occupied by him or under his control to be used for that purpose, or by persons raffling or using a game of chance for money or other property, shall be fined not more than two hundred dollars."

This statute is very broad and specifies several offences. Under it a person is criminally liable who knowingly allows premises owned or occupied by him or under his control to

be used by persons using a game of chance for money or other property.

The pleader, however, has not undertaken to proceed under this statute. V. S. 5135 renders one criminally liable "who has or keeps on premises owned or occupied by him implements or things used in gambling, and permits persons resorting to such premises to use such implements or things for the purpose of gambling." Other sections of the statutes prohibit in very broad terms wagering and gaming.

The claim of the State is that the first count which purports to be brought under some statute is good at common law. This count was apparently framed to meet the requirements of that part of the repealed prohibitory liquor law relating to nuisances, in which gambling was put on a footing with the unlawful keeping or disposition of intoxicating liquor. See the form prescribed by V. S. 4554. Some words are added but none which affect the essential allegations.

Can this count be held good at common law? The gaming house or place which the common law regarded as a nuisance, and which at common law was indictable as such was a "common" gaming house or place and was proceeded against as such. Many allegations were used which were surplusage, but it was essential to allege that the house was a common gaming or gambling house, and, perhaps, that it was kept for lucre and gain. See Stat. 23 Hen. VIII, C, 9, s. 11. 2 Hawkins's P. C. Leach's Ed. Chap. 37 s. 6. And see the forms of indictments at common law in Chitty's Criminal Law and Wharton's Precedents.

The question is not what the common law ought to have been, but what it in fact was. The states generally have taken higher ground in this respect than did the common law, and the whole subject has pretty generally been covered by statute. The whole subject was fully covered in this State

until the repeal of the liquor nuisance law, and while the repeal of the part of that law which related to gambling places was probably inadvertent it was none the less effectual.

The pro forma judgment is reversed, the demurrer sustained, the indictment adjudged insufficient and quashed, and the respondent is discharged.

SALMON STERN *v.* EDWARD B. SAWYER ET AL.

January Term, 1905.

Present: ROWELL, C. J., TYLER, MUNSON, START, WATSON, HASELTON, and POWERS, JJ.

Opinion filed June 6, 1905.

Landlord and Tenant—Lease—Sureties—Sale by Lessor of Part of Leased Premises—Waiver by Lessee of Lessor's Breach of Covenant to Repair—Effect on Contract of Suretyship.

Where premises are leased for a term, the lessor cannot, by sale and conveyance, disturb the lessee in his possession and enjoyment during the term, but can only convey his reversionary interest, and upon such conveyance the rent passes to the purchaser as an incident to the reversion.

The contract of suretyship is *strictissimi juris*. To the extent, and in the manner, and in the circumstances pointed out in his obligation the surety is bound, and no further; and any change in a contract for the fulfilment of which a surety is bound, made between the debtor and creditor, without the consent of the surety, whether prejudicial to him or not, discharges the surety.

The plaintiff, by a lease under seal executed by him and the lessee, leased his hotel with its furniture and fixtures and certain land connected therewith for a stated term at a monthly rental, and

covenanted to furnish the hotel and put it in good repair. It was covenanted that the plaintiff might sell the property during the term on six months' notice to the lessee. The defendants at the same time executed on the back of the lease a sealed agreement whereby they became sureties for "the punctual payment of the rent and the performance of the covenants in the above agreement" by the lessee. The lessee took possession of the property before the hotel was repaired and furnished. During the term the plaintiff, with the consent of the lessee, and under an agreement with him that the lease should in no way be affected thereby, but without notice to the defendants, sold a portion of the land leased to a man who built a livery barn thereon. *Held*, that the plaintiff's reservation of the right to sell the entire hotel property on six months' notice to the lessee did not justify the sale of a part thereof without the consent of the sureties, and that such sale discharged the sureties, regardless of whether they or the lessee were prejudiced thereby.

The fact that the lessee took possession of the hotel without its being repaired and furnished according to the covenant, and thereby waived its breach, did not bind the sureties. By thus waiving the breach of that covenant, the lessee took possession of the hotel under a different contract than the one the performance of which on his part was guaranteed by the defendants, and they were thereby discharged.

COVENANT on a contract of suretyship. Pleas, *non est factum* with notice thereunder, and six special pleas in bar. Heard on a general demurrer to each plea, and on a motion to dismiss the notice at the December Term, 1904, Caledonia County, *Tyler*, J., presiding. Without hearing and strictly *pro forma*, demurrers overruled, pleas adjudged sufficient, and motion to dismiss the notice overruled. The plaintiff excepted. The opinion states the case and the substance of the pleas and notice.

May & Hill, and *Young & Young* for the plaintiff.

An actual eviction of a tenant from part of the premises leased will not bar the landlord's action for rent, but results

only in an apportionment of the rent unless the tenant consents to surrender the part, and agrees to pay full rent. 18 Am. & Eng. Enc. of Law, 2nd Ed. 625; *Underwood* v. *Blanchard,* 47 Vt. 305; *Knapp* v. *Marlboro,* 34 Vt. 235; Rawle on Covenants, 167; *Bayton* v. *Morgan,* 22 Q. B. D. 74; *Worthington* v. *Cook,* 56 Md. 51; *Ehrman* v. *Mayer,* 57 Md. 612; *Smith* v. *Pendergast,* 26 Minn. 318; *Daniels* v. *Richardson,* 22 Pick. 565; *Reed* v. *Ward,* 22 Pa. St. 144; *Linton* v. *Hart,* 64 Am. Dec. 691; *Farley* v. *Craig,* 11 N. J. L. 262; *Dewitt* v. *Pearson,* 112 Mass. 8.

Dunnett & Slack for the defendant.

The sureties were discharged by the sale by the plaintiff of part of the premises leased. *Page* v. *Krekey,* 137 N. Y. 307, 33 Am. St. Rep. 731; *Rees* v. *Berrington,* 2 Ves. Jr. 540; *Eyre* v. *Bartrop,* 3 Madd. 221; *Calvert* v. *The London Dock Co.,* 2 Kee 638; *Rees* v. *U. S.,* 9 Wall. 13; *Polak* v. *Everett,* 12 Q. B. D. 669; *Holme* v. *Brunskill,* 3 Q. B. D. 495; *Miller* v. *Stewart,* 9 Wheat. 681; *U. S.* v. *Boecker,* 21 Wall. 652; *Board of Comrs.* v. *Branahan,* 57 Fed. 179; *Dobbin & Adams* v. *Bradley,* 17 Wend. 422; *U. S. Glass Co.* v. *W. Va. etc. Co.,* 81 Fed. 993; *U. S.* v. *Ulrici,* 111 U. S. 38; *Whitcher* v. *Hall,* 11 E. C. L. 214; *Warren* v. *Lyons,* 152 Mass. 310; *Bank of St. Albans* v. *Smith,* 30 Vt. 148; *Corlies* v. *Estes,* 31 Vt. 653.

TYLER, J. On March 19, 1902, the plaintiff executed and delivered to F. N. Keeler a lease of the St. Johnsbury House, with its furniture and fixtures and a large lot of land connected with the hotel, at a monthly rental of $112.50. The plaintiff covenanted to put the hotel in good repair, to furnish it suitably and pay all the taxes and insurance. The term was to begin when the hotel was repaired and furnished and continued three or five years at the option of the lessee,

who was to quietly occupy and enjoy the property provided he kept his covenants.

The lessee covenanted that he would occupy the premises in a good husbandlike manner, pay his monthly rent and quietly surrender the premises to the lessor at the end of the term. There was a covenant that the lessor might sell the property during the term on six months' notice to the lessee, who should have the first chance to purchase; also a covenant for re-entry by the lessor for non-payment of rent. The defendants on the same day executed upon the lease the following agreement under seal:

"In consideration of the letting of the premises above described and for the sum of one dollar, I do hereby become surety for the punctual payment of the rent and performance of the covenants in the above agreement mentioned, to be paid and performed by Frederick N. Keeler, and if any default shall be made therein, I do hereby promise and agree to pay unto Salmon Stern, or his assigns, such sum or sums of money as will be sufficient to make up such deficiency and fully satisfy the conditions of said agreement, without requiring any notice of non-payment or proof of demand made."

The lessee took possession of the hotel before it was repaired and furnished, and on April 16, 1903, he executed and delivered to the lessor a writing under seal as follows:

"I, Frederick N. Keeler, of St. Johnsbury in the County of Caledonia, in consideration of one dollar paid to my full satisfaction by Salmon Stern, of Lyndon, in the County of Caledonia, do hereby freely grant permission to the said Salmon Stern to sell fifty-three feet and use six additional feet for a driveway off from the westerly part of the premises leased to me by said Salmon Stern, by his lease dated the 19th day of March, A. D. 1902; and the sale of said land and my permission hereby granted shall not in anyway whatsoever

affect the validity of the said lease, and said lease shall hereafter have the same force and effect as if said land had not been sold."

The plaintiff immediately sold the land released to Gilman & Carr, who built a livery barn upon it. Upon the lessee's failure to pay his rent for several months the plaintiff brought this suit against the defendants upon their agreement. The declaration is in nine counts which allege the taking possession of the hotel property by the lessor, under the lease, April 1, 1902, his continuing in possession until the bringing of the suit and his failure to pay the stipulated rent. The second count alleges that he had always been in the use and occupation of all the property leased that was of any material value. No question is made as to the sufficiency of the several counts.

The defendants filed seven pleas in bar of the plaintiff's right of recovery. The first denied that any part of the rent in the declaration mentioned was in arrear and unpaid and is in effect a traverse; the second alleged that the plaintiff failed to repair and furnish the hotel according to his covenant in the lease; the third, fourth and fifth set out in defence that the plaintiff, by means of the permission or release obtained from the lessee, sold and conveyed to Gilman and Carr, without notice to the defendants, the land described in said release and the use of the six additional feet for a driveway for $2,250; that said purchasers immediately entered into possession of the land sold to them by the plaintiff; that they have ever since occupied the same and excluded the lessee therefrom; that offensive odors were carried from the livery barn to the hotel to its great injury. The third, fourth and fifth pleas differ from each other only in the allegations of injury to the defendants by said sale. They all allege the lessee's eviction from the land.

The seventh plea is *non est factum,* with a notice attached, pursuant to our statute. It states the same matters in defence that are alleged in the pleas.

The plaintiff filed a general demurrer to each plea and moved to dismiss the notice.

The question is whether any of the pleas are sufficient as against the demurrers.

The defendants contend that the release obtained by the plaintiff from the lessee without their consent or knowledge discharged them from their obligation; that they were discharged by the change in the contract by which the rent should continue the same for a part of the leased premises as it had been for the whole; that the injury that resulted to the hotel property from the erection of the livery barn effected their discharge, and that the lessee took possession under a new and oral contract with the plaintiff.

The plaintiff contends that the lessor could sell a portion of the leased premises and that the lessee's only remedy was an apportionment of the rent; but that is not the law of this case. It is true as a general proposition that a right to sell and convey is incident to the ownership of land, but where the premises are under lease for a term of years an estate for that term has been, by the act of the lessor, carved out of the fee, and the lessor cannot, by a sale and conveyance, disturb the lessee in his possession and enjoyment of the premises during the term. The lessor can only convey his reversionary interest, and upon such conveyance the rent passes to the purchaser as an incident to the reversion. As some authorities state it, the lessee is absolute owner for the term granted, while the landlord's rights are confined to his reversionary interest.

No question arises here in respect to the right of the lessor, as between himself and the lessee, to sell and convey

his reversionary interest in a part of the leased premises, nor is any question presented about apportionment of rent, for the surrender of a part of the land was freely granted by the lessee to the lessor in the written release which also contained a promise that the surrender should not affect the validity of the lease.

The only question is: How did the surrender and acceptance of a part of the demised premises from the terms of the lease affect the rights and obligations of the sureties under their covenant? Upon this subject the authorities are nearly uniform in support of the rule as laid down by Judge Story in *Miller* v. *Stewart,* 9 Wheat. 681:

"Nothing can be clearer, both upon principle and authority, than the doctrine that the liability of a surety is not to be extended by implication beyond the terms of his contract. To the extent, and in the manner, and under the circumstances pointed out in his obligation he is bound, and no further. It is not sufficient that he may sustain no injury by a change in the contract, or that it may even be for his benefit. He has a right to stand upon the very terms of his contract, and if he does not assent to any variation of it, and a variation is made, it is fatal." In that case the bond of a collector of taxes, upon which the defendants were sureties, recited his appointment for eight townships. Another township was interlined and it was held that the interlineation discharged the surety for all the towns.

United States v. *Boecker,* 21 Wall. 652, was a suit on a distiller's bond, and there was a misdescription of the place where the business was to be carried on. It was described as on the corner of Hudson Street and East Avenue, when it should have been corner of Hudson and Third Streets in the same town. It was held that the party was not liable, and the doctrine in *Miller* v. *Stewart* was approved. The reasoning

of the Court was that the premises having been specified in the notice, the surety before signing the bond, might have examined and determined how far, in the event of liability by the principal, the property would be available as security for the government and indemnity for himself; that the surety had a right to rely upon the principal paying his rent out of the entire property; that the United States having a lien, the surety was entitled to the benefit of it. *Martin* v. *Thomas,* 24 How. 315, 16 Law. Ed., 689; *Reese* v. *United States,* 9 Wall. 13, 19 Law. Ed. 541.

Warren v. *Lyons,* 152 Mass. 310, is a strong case and refers to *Miller* v. *Stewart* as stating the settled rule of law upon this subject. It is also referred to as authority in the elaborate notes to *Griswold* v. *Hazard,* 141 U. S. 260, 35 Law. Ed. 678. See cases there collected. *Bank* v. *Gerke,* 6 Am. St. R. 453.

In *Page* v. *Krekey,* 137 N. Y. 307, 33 Am. St. Rep. 731, it was held that the defendant's contract as guarantor was *strictissimi juris,* that he was discharged by any alteration of the contract to which his guaranty applied, whether material or not, and that the Court would not inquire whether it was or was not to his injury.

In *Rees* v. *Berrington,* 2 Lead. Cas. in Eq. Lord Loughborough remarked in substance that he could not inquire what mischief had been done,—whether it produced inconvenience to any one, for the rule was that there should be no transaction with the principal debtor without acquainting the surety with it; that the surety only engages to make good the deficiency; that it is the clearest and most evident equity not to carry on any transaction without the privity of him who must necessarily have a concern in every transaction with the principal debtor; that he cannot be bound without being consulted,

and that he must judge whether he will give that indulgence contrary to the nature of his engagement.

In *Rees* v. *United States* it was held that any change in the contract without the assent of the sureties discharged them. The Court said: "Nor does it matter how trivial the change, or even that it may be of advantage to the sureties. They have a right to stand upon the very terms of their undertaking." See Brandt on Suretyship, 629, and cases there cited. 2 Cyc. 216; *Staver* v. *Locke,* 22 Or. 519, 29 Am. St. Rep. 621. See notes to this case and to *Gates* v. *McKee,* 64 Am. Dec. 549.

In *Holme* v. *Brunskill,* Law. Rep. 3 Q. B. D. 495, it was held that a surety for rent was discharged if the tenant surrendered part of the demised premises and the rent was thereby reduced. In *Polak* v. *Everett,* 1 Q. B. D., 669, Mellor, J. said that the question was one of contract, and the surety is entitled not to be affected by anything done by the creditor, who has no right to consider whether it might be to the advantage of the surety or not; that the surety is entitled to remain in the position in which he was at the time when the contract was entered into. Quain, J., said, "I agree with my brother Mellor, that it is a thoroughly sound and safe principle, that where the act is voluntary and deliberate, the creditor altering the contract and rendering it impossible that it should be carried out, in its original form, should suffer. This is a sound doctrine which ought not to be impeached and cannot be impeached because it is established by authority."

Brandt in § 429 cites a case like the present one. A yard, shed and frame dwelling-house were rented for $375 a month, and a stranger guaranteed the rent. The lessor took back the dwelling-house, rented it to another, and reduced the rent for the remainder of the premises to $300 a month; *held,* that the

guarantor was thereby discharged. *Penn* v. *Collins,* 5 Rob. (La.) 213.

Brandt formulates this rule from cases cited in the note to § 427: "No principle of law is better settled at this day than that the undertaking of the surety being one *strictissimi juris,* he cannot, either at law or in equity, be bound farther or otherwise than he is by the very terms of his contract. * * * Neither is it of any consequence that the alteration in the contract is trivial, nor even that it is for the advantage of the surety. * * * He is not bound by the old contract for that has been abrogated by the new; neither is he bound by the new contract, because he is no party to it; neither can it be split into parts so as to be his contract to a certain extent and not for the residue; he is either *in toto* or not at all." Many cases are cited in the note to the paragraph in support of this rule, that is said to be so firmly imbedded in the law of principal and surety that no considerations of apparent equity are permitted to disturb it, however great the hardship may be which, in individual cases, appeals for a modification of the rule. Among the cases cited are *Polak* v. *Everett, Holme* v. *Brunskill,* also, *National Bank* v. *United States,* 164 U. S. 227, 41 Law. Ed. 412.

It is not necessary to consider further the decisions of other courts for it was held in *Bank* v. *Smith,* 30 Vt. 148, that: "A change made in a contract of suretyship between the creditor and debtor, without the assent of the surety, whether prejudicial to him or not, discharges the surety." See, also, *Corlies & Co.* v. *Estes,* 31 Vt. 653, where the Court said: "It is only fair and in accordance with well understood principles, to presume that the defendant entered into his contract of guarantee in view of all the terms and provisions of the contract, and that he was becoming liable to the plaintiffs, only in respect to such rights as they might have in virtue

of a strict performance of their duties under the specific provisions of the contract, and of the failure of Davis and Rider to perform their correlative duties to the plaintiffs under the like provisions of the contract."

The plaintiff's reservation of a right to sell the entire hotel property on six months' notice to the lessee did not justify the sale of a part without the consent of the sureties. Their liability upon the lessee's covenants was based upon his occupation and use of the premises described in the lease. The lessor and lessee evidently did not have the sale of a part of the premises in contemplation when the lease was made, and it cannot reasonably be construed to have that effect. The plaintiff's evident intent was to reserve a right to sell the entire hotel property, if he had an opportunity, during the term of the lease.

It is alleged in the second count in the declaration that the lessee had had the occupancy and use of all of the leased premises that were of any use or value to him and which he had ever had occasion to use from April 1, 1902, until the bringing of this suit. The third, fourth and fifth pleas set out the release from the lessee to the plaintiff and the subsequent sale of the land released for $2,250, the truth of which allegations the demurrers admit. This brings the case within the rule stated and discharges the defendants from liability.

The lessor covenanted in the lease that he would furnish the hotel in all parts with good and suitable furniture, and put it in good repair by painting it outside and inside, papering, plumbing and making all other necessary repairs. The defendant pleads a breach of this covenant in defence of the action. The fact that the lessee took possession of the hotel without its being repaired and furnished according to the covenant and thereby waived the breach of it did not bind his sureties. It must be presumed that when the defendants be-

came sureties for the performance of the lessee's covenants they relied upon the plaintiff's performance of his covenant, which was obviously an important one for the success of the hotel and to enable the lessee to pay his rent. If the hotel had been well repaired and furnished, it is reasonable to suppose that it would have commanded a larger patronage and income than it would in a dilapidated and unfurnished condition. The lessee took possession of the hotel under a different contract than the one which the defendants guaranteed the performance of on his part, and we think that upon the authorities the defendants were thereby released. There is nothing in the case tending to show that the waiver by the lessee was with the defendant's consent or knowledge.

The pro forma judgment is affirmed, and cause remanded.

In Re Harriet A. Welch's Will.

October Term, 1904.

Present: Rowell, C. J., Munson, Start, Watson, Haselton, and Powers, JJ.

Opinion filed July 6, 1905.

Wills—Construction — Ambiguous Testamentary Designation—Evidence.

The person intended by a testamentary designation which applies in different degrees to two persons, but not accurately and completely to either, is to be determined by the language of the will, aided by proof of the circumstances in which the testatrix used the language, but without inquiring further as to her purpose.

In such case, the ascertainment of the person intended is a judgment of construction, and not a finding of fact.

A testatrix gave a legacy to "my niece Harriet Ellen Hubbard," which was claimed by each of her two nieces, "Harriet Anna Hubbard" and "Harriet Ella Hubbard Field." From a consideration of the whole will and all the circumstances in which the testatrix used the language, a majority of the Court hold that Harriet Ella Hubbard Field was the person intended by the will.

APPEAL from a decree of the probate court decreeing a legacy to Harriet Ella Hubbard Field. Harriet Anna Hubbard, Appellant. Heard on the report of a referee at the December Term, 1904, Addison County, *Tyler,* J., presiding. Decree of the probate court affirmed. Harriet Anna Hubbard, Appellant, excepted.

William H. Bliss for Harriet Anna Hubbard.

The county court decided the case as a question of law on the facts found, and the case comes before this Court just as it did before the county court. *Re McKeough's Est.,* 69 Vt. 41.

Middle names are often disregarded; errors in them do not vitiate contracts. 21 Enc. of Law, 2nd Ed. 302; *Alexander* v. *Wilmarth,* 2 Aikens 413; *Isaacs* v. *Wiley,* 12 Vt. 674; *Walbridge* v. *Kibbee,* 20 Vt. 543; *Allen* v. *Taylor,* 26 Vt. 599; *Dunn* v. *Gaines,* 1 McLean 321; *Gaines* v. *Stiles,* 14 Pet. 322.

Marvelle C. Webber for Harriet Ella Hubbard Field.

This is an exception to the finding of the fact by the county court that Harriet Ella Hubbard Field was the person intended by the testatrix. If the facts found by the referee, and the will of the testatrix tend to support the finding and judgment of the county court, the judgment must be affirmed.

McDaniels v. *McDaniels,* 40 Vt. 340; *Seward* v. *Heflin,* 20 Vt. 144; *Carr* v. *Sargent,* 15 Vt. 393.

MUNSON, J. We are called upon to ascertain the person entitled to a legacy given to the testatrix' niece, Harriet Ellen Hubbard. The legacy is claimed by two nieces of the testatrix, the petitioner and the appellant in this proceeding. The appellant's name is Harriet Anna Hubbard. The petitioner's maiden name was Harriet Ella Hubbard, but she became a Field by marriage some years before the will was made.

The county court sent the case to a referee to ascertain and report "all facts relative to the identity of the petitioner or the appellant * * with the legatee named in said will as Harriet Ellen Hubbard, that the court may be able to determine to what person to decree said legacy." Upon the coming in of the report the court filed the following: "Upon the facts found by the referee and upon our construction of the will, we find that Harriet Ella Field, the petitioner, was the person intended by the testatrix, * * and that the said Harriet Ella is entitled to receive said legacy."

The petitioner treats the decision of the county court as a mere finding of fact, which she is entitled to have sustained if there was any evidence tending to support it. The appellant contends that the decision was one of construction, the correctness of which is to be inquired into by this Court.

A testamentary designation which is equally applicable to more than one person or thing raises a question of intention which is independent of construction, and permits an inquiry as to the testator's actual purpose. The designation in controversy applies in different degrees to both claimants, but not accurately nor completely to either. Here, the Court is to gather the intention of the testatrix from the language of the will, aided by proof of the circumstances in which the testa-

trix used the language, but without inquiring further as to her purpose. This being the nature of the inquiry, the ascertainment of the person intended must be treated as a judgment of construction and not as a finding of fact. *McKeough's Est.* v. *McKeough,* 69 Vt. 41.

If the appellant was intended, the only mistake is in the middle name. If the petitioner was intended, her middle name is erroneously given, and her maiden surname used in place of the name acquired by marriage. At the time the will was drawn, the petitioner had been married twelve years. The testatrix had corresponded with her continously during that time, and must have addressed her through the mails as Mrs. Field. If the name in the will was given to the draftsman by the testatrix, it is difficult to believe that the maiden name would have been used if Mrs. Field was intended. It appears that the testatrix understood the importance of changing the name in case of marriage. There was a previous will, executed nine years before. In arranging for the will in suit, the testatrix gave the draftsman this former will and a memorandum prepared by her. Three of the female legatees named in the former will had married in the meantime, and their names were changed accordingly in the new will. The draftsman knew of these marriages only from the memorandum given him or from oral instructions of the testatrix. The bequest in controversy was given in the earlier will by the same name as in the last. There is nothing to indicate how the name came to be so written in the earlier will. If the bequest was intended for the petitioner, and the name as originally written came to the attention of the testatrix when making preparations for another will, it would seem almost certain that the name would have been changed in the new will, as well as the names of those who had married after the making of the earlier will. And it seems very probable that

the name as previously written did come to her attention at that time. One who procures a draftsman to prepare a will, and submits an old will with a memorandum of changes for his guidance, may well be supposed to have looked over the old will to see what changes should be noted in the memorandum. A mistake in the surname would thus have been discovered, and its correction accomplished, unless the correction failed through a subsequent undetected oversight of the draftsman. It is true that there was an error in the middle name whichever niece was intended, and that this passed without correction. But this circumstance can hardly be said to do away with the probability that an error in the surname would have been corrected in the circumstances stated. These considerations indicate that the appellant was intended.

The middle name given in the will has some resemblance both in letter and sound to that of the petitioner, but is entirely different from that of the appellant. The testatrix was perfectly familiar with the petitioner's middle name; for after her marriage the petitioner usually signed her name "Ella H. Field," and was usually called Ella by her friends, including the testatrix. The testatrix' name was Harriet Anna. Soon after the birth of the appellant, her father wrote the testatrix that the child had been named for her, and the testatrix' reply makes it certain that she then understood that the appellant's middle name was Anna. But in subsequent correspondence with the family she called her Hattie, and did not again refer to the middle name. The earlier will was made less than eight years after the correspondence regarding the appellant's name, and it can hardly be supposed that the testatrix had then forgotten that the child was named for her, and that her middle name was the same as her own. It would ordinarily seem that an erroneous insertion of the name "Ellen" might pass unnoticed more easily if the name intended was Ella than if it

was Anna; but there are some facts here that affect the weight of this consideration. Both wills were drawn by the same person. The draftsman's handwriting was obscure and difficult to read. Both the draftsman and the testatrix were somewhat deaf. Another clause of the last will affords evidence that the draftsman was somewhat inaccurate. This will was read to the testatrix, and was not seen by her after its execution. Perhaps in view of these circumstances no very satisfactory argument can be drawn from a comparison of the middle names.

There are other provisions of the will that bear upon this question. The petitioner's father was Varsil Hubbard, and the appellant's Peter Hubbard. The former had ten children, and the latter four. Peter was given one thousand dollars, and his children nothing, unless the legacy in question goes to the appellant. The next largest legacies were five hundred dollars. Nothing was given to Varsil, but four legacies were given to his children, and five if this legacy goes to the petitioner. It is apparent from the facts reported that the petitioner was the testatrix' favorite among the children of Varsil. It is found that her relations with the other children were friendly. Unless this legacy was intended for the petitioner, we have nothing given to the child with whom her relations were specially intimate, while legacies of from two to five hundred dollars are given to three of her sisters and a brother. The degree of the intimacy between the petitioner and the testatrix will appear more fully from the further statement.

The testatrix was a native of Rochester, Vt., but had lived a long time in Middlebury. At the date of the will the petitioner was forty-one years old and the appellant seventeen. The husband of the one and the parents of the other were in moderate but comfortable circumstances. The appellant was

born in Wisconsin, and there is no mention of her having lived or been elsewhere. The testatrix visited the appellant's family when the appellant was two years old. During her stay of three weeks she kept the appellant with her a good deal, showed much affection for her, gave her a silver spoon, and spoke of taking her home and educating her. She afterwards sent the appellant some small presents. The testatrix and the appellant's parents kept up a correspondence, but nothing further appears as to the testatrix' relations with the appellant. The petitioner lived with her father in Rochester until she was twenty, and after a considerable absence resided in Rochester again about three years. After her marriage she lived in Orange, Mass. While she was living with her father the testatrix visited the family from one to four times a year, and her father visited the testatrix about as often, usually taking members of the family with him. The petitioner went with her father once or twice a year. When a child, she lived with the testatrix one winter and attended school, and somewhat later she made the testatrix two visits of considerable length. The testatrix visited the petitioner every two or three years while the petitioner lived in Orange. The petitioner did not visit the testatrix at her home as often as that, but she went to Rochester quite often, and the testatrix would see her there. A correspondence between the testatrix and the petitioner began before the latter's marriage, and continued until the testatrix' death. The testatrix wrote quite often, usually once in two or three weeks, and the petitioner replied. If the petitioner did not answer promptly, the testatrix would write again. She continued to write the petitioner as long as she was able to write, and then had others write for her. These facts touching the relations of the testatrix and the two nieces point to the petitioner as the more probable recipient of her bounty.

Upon a review of the whole matter, a minority of the Court think the use of the name Hubbard instead of Field is the controlling feature of the case, and consider that the appellant is the person intended; while a majority of the Court think that greater weight should be given to other facts disclosed by the will and evidence, and that these identify the petitioner as the one meant. It is held therefore that the petitioner is the person intended by the will.

Judgment affirmed with costs; to be certified to the Probate Court.

TOWN SCHOOL DISTRICT OF HARDWICK *v.* TOWN SCHOOL DISTRICT OF WOLCOTT.

May Term, 1905.

Present: ROWELL, C. J., MUNSON, START, WATSON, and HASELTON, JJ.

Opinion filed July 22, 1905.

Municipal Corporations—Town School Districts—Implied Contracts—Recovery for Tuition—Examiner of Teachers—No. 23, Acts 1900.

A municipal corporation may be held liable on an implied promise.

In assumpsit by one town school district against another town school district to recover the expense of instruction furnished in plaintiff's schools to children of school age residing in the defendant district, it appeared that one of the plaintiff's directors notified one of defendant's directors that plaintiff's directors did not feel that they could school defendant's children any longer at the former price, and that, if said children should continue to attend plaintiff's schools, defendant would be expected to pay tuition on

the basis of the cost per pupil for maintaining the school attended. After this notice, children residing in the defendant district continued to attend plaintiff's schools, without dissent from defendant's directors, and plaintiff furnished them such instruction as defendant was bound to furnish. *Held*, that said notice by one of plaintiff's directors to one of defendant's directors was notice to defendant's directors; that defendant's directors assented to the instruction of the children in plaintiff's school at the modified price, and that plaintiff's directors had a right to understand that defendant's directors so assented, and to furnish the instruction in reliance thereon, and upon the credit of defendant, notwithstanding the fact that there was no express promise.

No. 23, Acts 1900, providing that in case of the failure of the school directors to agree as to tuition of pupils attending school in an adjoining town, either board of directors may appeal in writing to the examiner of teachers whose decision in the matter shall be final, has no application to a case where the dispute is as to whether any liability exists.

GENERAL ASSUMPSIT to recover the expense of instruction furnished by plaintiff to pupils residing in defendant district. Heard on an agreed statement at the December Term, 1904, Caledonia County, *Tyler*, J., presiding. Judgment for the defendant to recover its costs. The plaintiff excepted.

The agreed statement contains the stipulation that if the plaintiff is entitled to recover, it is entitled to judgment for $87.46, with interest from Feb. 9, 1903.

B. E. Bullard, and *Taylor & Dutton* for the plaintiff.

The plaintiff in good faith, relying upon the notice to defendant's director, performed for defendant the service which defendant was bound to perform, and is entitled to recover for the same. *Worcester* v. *Ballard*, 38 Vt. 60; *Rowell* v. *School Dist.*, 59 Vt. 658; *Daggett* v. *Mendon*, 64 Vt. 323; *Union etc. Co.* v. *School Dist.*, 20 L. R. A. 136; *Brown* v. *School Dist.*, 55 Vt. 43; *Stone* v. *Berkshire Cong. Soc.*, 14 Vt. 86; *Sheldon* v. *Fairfax*, 21 Vt. 102; *Gassett* v. *Andover*,

21 Vt. 342; *Prop. Canal Bridge* v. *Gordon,* 1 Pick. 308; *Abbott* v. *School Dist.,* 7 Greenl. 96; *Danforth* v. *Sco. Turnpike Co.,* 12 Johns. 230; *Denn* v. *Rec. War. etc. of St. Andrews Church,* 14 Johns. 118; *Patterson's Heirs* v. *Bank of Columbia,* 7 Cranch 306; *Overseers of No. Whitehall* v. *Overseers of So. Whitehall,* 3 Serg. & R. 117; *Church* v. *Mulford,* 3 Halst. 182; *Brady* v. *Mayor,* 1 Barb. 584; *Allegany* v. *McClarken,* 14 Pa. St. 81; *Derby* v. *Fishing Co.,* 2 Conn. 254; *Rex* v. *Biggs,* 3 P. Williams 419; *Powell* v. *Newburg,* 19 Johns. 284; *Hayden* v. *Turnpike,* 10 Mass. 397; *Bank of U. S.* v. *Dandridge,* 12 Wheat. 70; *Seagraves* v. *Alton,* 13 Ill. 566; Smith Munic. Corp. § § 238, 239; Dill. Munic. Corp. § 459; *Gas Co.* v. *San Francisco,* 9 Cal. 469; *Gas Light Co.* v. *Memphis,* 93 Tenn. 612.

The defendant having accepted without dissent the service rendered by plaintiff in instructing the children according to the proposal made by plaintiff's director, it became a ratified contract. *Topsham* v. *Rogers,* 42 Vt. 189; *Barton* v. *Pittsford,* 44 Vt. 371; *Backman* v. *Charleston,* 42 N. H. 125.

Thomas C. Cheney and *R. W. Hulburd* for the defendant.

It is a general rule that municipal corporations are liable only on an express contract. 15 Am. & Eng. Enc. Law 1081; 1 Dill. Munic. Corp. (2 Ed.) § 383; Tiedman Munic. Corp. § 164; *Aldrich* v. *Londonderry,* 5 Vt. 441; *Castleton* v. *Miner,* 8 Vt. 209; *Houghton* v. *Danville,* 10 Vt. 537; *Putney* v. *Dummerston,* 13 Vt. 370; *Churchill* v. *West Fairlee,* 17 Vt. 447; *Orcutt* v. *Town of Roxbury,* 17 Vt. 524; *Patrick* v. *Town of Baldwin,* 53 L. R. A. 613; *Farmer* v. *Town of Salisbury, ante.*

START, J. The action is to recover for instruction furnished by the plaintiff in its schools to children, of school age,

residing in the defendant town school district, and is submitted on an agreed statement of facts, from which it sufficiently appears that prior to March 19th, 1901, the plaintiff had furnished instruction in its school for some of the children residing in the defendant town school district, and on that day one of the plaintiff's school directors, acting for the board, had a talk with one of the defendant's directors about the children residing in the defendant town attending the plaintiff's schools, and then told the defendant's director that the plaintiff's directors did not feel that they could school the Wolcott children any longer at the former price; that the plaintiff had to pay the town of Woodbury the proportionate amount of the expense of the school attended by Hardwick pupils; and that, if the Wolcott children, in the future, should continue to attend the schools in Hardwick, the town of Wolcott would be expected to pay tuition on the basis of the cost per pupil for maintaining the school attended. The defendant's director replied that he was not empowered to make any contract for the board. The defendant's directors did not, during the time in question, designate any school for their children to attend. Children residing in the defendant town continued to attend the plaintiff's schools, and the plaintiff furnished them such instruction as the defendant was bound to provide relying upon the notice given by one of its directors to one of the defendant's directors.

It not appearing that there was an express promise by the defendant's directors to pay for instruction, the defendant insists that there can be no recovery. But it is not necessary that such a promise should be shown. The facts and circumstances appearing show a contract in fact, and this is sufficient. *Parkhurst* v. *Krellinger,* 69 Vt., 375.

The notice given, by one of the plaintiff's directors of the action of the plaintiff's directors, in regard to the price

for tuition to be thereafter paid, to one of the defendant's directors, was notice to the defendant's directors; and the defendant's directors after such notice having omitted to designate a school for the children to attend; and the children having continued to attend the plaintiff's schools, without dissent from the defendant's directors, and there receive the instruction that the defendant was under a legal duty to furnish; the defendant's directors are deemed to have assented to a modification of the contract, under which children residing in the defendant's town had been instructed in the plaintiff's schools, as insisted upon by the plaintiff's directors; and to have assented to the instruction of the children in the plaintiff's schools at the modified price which is charged by the plaintiff, and the plaintiff's directors had a right to understand that the defendant's directors so assented, and to furnish the instruction in reliance thereon, and upon the credit of the defendant, notwithstanding the fact that there was no express promise. A contract enforceable against a municipal corporation, may be proved by circumstances, acts, conduct, and sayings of municipal officers having authority to bind the corporation. *Worcester* v. *Ballard,* 38 Vt. 60; *Rowell* v. *School District,* 59 Vt. 658; *Durfey* v. *Worcester,* 63 Vt. 418; *Sheldon* v. *Fairfax,* 21 Vt. 102; *Gassett* v. *Andover,* 21 Vt. 342.

The case of *Aldrich* v. *Londonderry,* 5 Vt. 441 and some others, cited by the defendant, which seem to hold that a municipal corporation is only liable upon an express promise have, in effect, been overruled by more recent holdings of this Court. Then in *Worcester* v. *Ballard,* before cited, it is held that when the claim against a town rests upon a contract or agreement the same facts and language which would constitute a contract between individuals will also between an individual and an overseer of poor acting in behalf of his town; and in *Gassett* v. *Andover,* before cited, it is held, that corpora-

tions may be held liable upon an implied promise as well as individuals.

No. 23 of the Acts of 1900, which provides, in part, that in case of the failure of the school directors to agree as to the tuition, either board of directors may appeal in writing to the examiner of teachers whose decision in the premises shall be final, has no application to a case, like the one at bar, where the question is one of liability or no liability.

Judgment reversed, and judgment for the plaintiff to recover the sum of eighty-seven dollars and forty-six cents with interest thereon from February 9th, 1903, and its costs.

THE REYNOLDS-MCGINNESS CO. *v.* GEORGE W. GREEN.

May Term, 1905.

Present: ROWELL, C. J., TYLER, MUNSON, START, WATSON, and HASELTON, JJ.

Opinion filed July 22, 1905.

Executors—Contracts for Benefit of Estate—Personal Liability — Statute of Frauds—Brokers—Commissions—Expenses.

When an executor contracts for services which are for the benefit of the estate that he represents, without limiting his liability, he binds himself in his individual capacity.

A debt thus contracted is not the debt of said estate, and, therefore, is not within that clause of the Statute of Frauds relative to the "special promise of an executor or administrator to answer damages out of his own estate."

When a broker who has been employed to sell real estate fulfils his part of the agreement, and seasonably finds a customer who is ready and able and legally bound to purchase the property and pay for it upon the terms prescribed by the owner, and notifies the owner that he has such a customer, giving his name, the broker is entitled to the commission agreed upon, although, because of the owner's refusal to convey, the sale is not perfected.

The defendant, as executor of a will, by a written contract employed plaintiffs, who were real estate brokers, to sell a farm belonging to the estate upon specified terms and for an agreed commission. Plaintiffs found a customer who was ready and able to purchase the farm and to pay for it upon the terms specified, and so notified defendant, and fully performed their part of the contract, but defendant declined to convey. In an action to recover the commission, *held*, that defendant was liable on the contract in his individual capacity; that the contract was not within that clause of the Statute of Frauds relative to the "special promise of an executor or administrator"; and that plaintiffs were entitled to recover the commission agreed upon.

The fact that defendant did not, at the time he made the contract, have a license from the probate court to sell the farm is probably immaterial. But, if material, the objection is obviated by the fact that, before the contract was made, the parties interested in the estate had authorized defendant to sell the farm.

The commission which defendant agreed to pay plaintiffs for their services is a proper book charge, and is recoverable in an action of book account.

In the absence of an agreement by defendant to pay the expenses incurred by plaintiffs in procuring a customer, it must be taken that the agreed commission was for services and expenses.

BOOK ACCOUNT. Heard on the report of an auditor at the March Term, 1904, Chittenden County, *Powers*, J., presiding. Judgment for the plaintiffs to recover $180 damages and costs, the agreed commission, and disallowing plaintiffs' charge of $16.24 for expenses. Both the plaintiffs and the defendant excepted.

The Reynolds-McGinness Co. is a firm. The opinion states the case.

M. G. Leary for the defendant.

Martin S. Vilas and *Rufus E. Brown* for the plaintiffs.

The Statute of Frauds has no application to this case. *Bellows* v. *Sowles,* 57 Vt. 164; *Templeton* v. *Bascom,* 33 Vt. 132; *Cross* v. *Richardson,* 30 Vt. 164; *Lampson* v. *Hobart,* 28 Vt. 679; *Harrington* v. *Rich,* 6 Vt. 666; *Randall* v. *Kelsey,* 46 Vt. 163; *Aiken* v. *Bridgman,* 37 Vt. 249; Brown, Stat. Frauds, 150, 184; 2 Redf. Wills, 290; *Haskell* v. *Bowen,* 44 Vt. 579; *French* v. *Est. of Thompson,* 6 Vt. 54; *Anderson* v. *Davis,* 9 Vt. 136; *Powers* v. *Douglass,* 53 Vt. 471; *Reid* v. *Nash,* 1 Wils. 305; *Rix, Admr.* v. *Nevins,* 26 Vt. 304; *Smith* v. *Estate of Rogers,* 35 Vt. 140.

It is well settled that a broker is entitled to his commission when his part of the contract is performed. *Durkee* v. *Vt. C. R. R. Co.,* 29 Vt. 142; *Casady* v. *Seely,* 29 N. W. (Iowa) 93; *Reed* v. *Reed,* 82 Pa. St. 420; *Lane* v. *Albright,* 49 Ind. 275; *Hyams* v. *Miller,* 71 Ga. 608; *Desmond* v. *Stebbins,* 140 Mass. 339.

The broker is entitled to his necessary expense in procuring a purchaser. *Lacey* v. *Hill,* L. R. 18 Eq. 182; *Didion* v. *Duralde,* 2 Rob. 153 (Wis. 1896); *Carpenter* v. *Momsen,* 92 Wis. 449, 65 N. W. 1027.

START, J. The defendant, as executor of the estate of B. S. Kenyon, had a farm to sell, and employed the plaintiffs, who were real estate brokers, to sell it for him for six thousand dollars with a payment of fifteen hundred dollars down and a mortgage on the premises to secure the payment of the balance of the purchase money, and agreed to pay the plaintiffs for so doing a commission of three per cent.

The plaintiffs found a party who agreed to take the farm on the terms agreed upon by the plaintiffs and defendant;

notified the defendant, and fully performed their part of the contract, but the defendant declined to convey the farm and for this reason the sale was not consummated.

The fact that the services contracted for were for the benefit of the estate does not excuse the defendant from personal liability. In making the contract he did not limit his liability. When an executor contracts for the performance of services which are for the benefit of the estate which he represents, without limiting his liability, his contract is personal, and he is liable to the same extent and may be sued in his individual capacity the same as he would or could be for services rendered for his personal benefit. *Rich* v. *Sowles,* 64 Vt. 408; *McIntyre & Wardwell* v. *Williamson, 72* Vt., 183. Nor is the defendant exempt from liability by reason of V. S. 1224, which provides, in part, that no action at law or in equity shall be brought upon a special promise of an executor or administrator to answer damages out of his own estate, unless the promise is in writing and signed by the party charged therewith, or by some person thereunto by him lawfully authorized.

The debt was not a debt of the estate, and could not be made such, except so far as it might be a charge by the defendant as executor in the settlement of his account for administration expenses, and the defendant's promise was not a promise to answer in damages for a debt due from the estate to the plaintiffs out of his own estate, but was a promise made by him personally in order to obtain the performance of service which it was his duty to perform. His promise was therefore an original undertaking and not within the Statute of Frauds, *Bellows* v. *Sowles,* 57 Vt. 164. The fact that the defendant did not, at the time he made the contract, have a license from the probate court to convey the farm is probably immaterial, *Barthell* v. *Peter,* 88 Wis. 316, 43 Am. St.

Rep. 906. But, if it is a fact that should be noticed, it will not, in view of other facts found by the auditor, prevent a recovery. It is found that the parties interested in the estate had, before the contract was entered into, authorized the defendant to sell the farm; that there was nothing to prevent his procuring a license from the probate court for that purpose and that he did procure and have such a license at a time when the plaintiffs had a party ready, able and willing to take the farm on the terms proposed by the defendant and at the time the defendant refused to convey the farm. Nor will the fact that the sale was not perfected by a conveyance and the payment of the price for which the defendant offered to sell the farm defeat the plaintiffs' action. The failure to perfect the sale was through no fault of the plaintiffs, but was due solely to the refusal of the defendant to convey the property. If a broker within a reasonable time, if the time be not limited by the agreement, and so of the essence of the contract, find a customer who is both willing and able to take and pay for the property in the hands of the broker for sale upon the conditions imposed by the owner, and notifies the owner that he has such a customer, giving the name of the customer, and fully performs on his part, and the sale is not perfected by reason of the refusal of the owner to convey, the broker is entitled to the commission agreed upon. *McFarland* v. *Lillard,* 2 Indiana Appeals, 160; 50 Am. St. Rep. 234; *Cook* v. *Fiske,* 12 Gray 491; *Roche* v. *Smith,* 176 Mass. 595; 79 Am. St. Rep. 345; *Wray* v. *Carpenter,* 16 Col. 271; 25 Am. St. Rep. 265; *Gelatt* v. *Ridge,* 117 Mo. 553; 38 Am. St. Rep. 683; *Barthell* v. *Peter,* 88 Wis. 316; 43 Am. St. Rep. 906.

The facts found by the auditor do not justify the claim of the defendant, that the contract of sale was not in writing and therefore not enforceable, nor the claim that the plaintiffs did not inform him, and he did not know the name of

the party negotiating for the purchase of the farm. The contract of sale was in writing, signed by the party agreeing to purchase the farm on the terms proposed by the defendant, and seasonably shown to the defendant by the plaintiffs, and is plaintiffs' exhibit four.

The commission which the defendant agreed to pay the plaintiffs for their services is a proper book charge and is recoverable in this action.

The item, in the plaintiffs' specification, of $16.24 for expenses incurred by them in procuring a purchaser was properly disallowed by the auditor. The defendant did not agree to pay their expenses and in the absence of such an agreement it must be taken that the commission of three per cent on purchase price of the farm was for their services and expenses. 23 Am. and Eng. Ency. (2nd edition) 925.

Judgment affirmed without costs to either party in this Court.

LEWIS M. SMITH'S ADMINISTRATOR *v.* WILLARD M. SMITH.

January Term, 1905.

Present: ROWELL, C. J., TYLER, MUNSON, WATSON, HASELTON, and POWERS, JJ.

Opinion filed, July 27, 1905.

Evidence—Declarations — Introductory Statement — Conclusiveness of Master's Findings—Bill in Equity—Scope of Prayer—Decree "According to The Prayer."

In a suit in equity by an administrator to compel the defendant to convey to the orator certain real estate which, the orator

claimed, was conveyed to the defendant in fraud of the decedent, the orator introduced evidence that defendant requested the grantor to convey the title to him in order to avoid decedent's liability on a certain bond. *Held*, that the orator did not thereby place himself in the position of one seeking relief from his own fraud.

It is not error to allow a witness to state what she told defendant that decedent had said; it appearing that such statement began a conversation in which defendant made an admissible declaration, for the accurate presentation and correct understanding of which, such precedent statement is necessary.

The findings of a master will not be disturbed, when there is evidence tending strongly to support them.

In a bill in equity charging that the defendant has wrongfully received the rents of certain property, the prayer, that an accounting thereof be had, and that the defendant be decreed to pay over the sum found in his hands, asks merely for the net income, so that a decree "according to the prayer" does not deprive the defendant of credit for proper expenditures.

APPEAL IN CHANCERY. Heard on master's report and exceptions thereto, at the October Term, 1904, Essex County, *Start*, Chancellor. Decree for the orator "according to the prayer of the bill." The defendant appealed.

Lewis M. Smith died October 4, 1902. On September 12, 1902, he went from his home in Groveton, N.,H., to the village of Island Pond, Vt., to visit his brother, the defendant, and remained there till September 18, 1902, when he returned to Groveton. While at defendant's, and on September 12, 1902, Lewis delivered to defendant certain bank checks, amounting to $1,233, upon which defendant procured the cash. On September 18, 1902, defendant purchased of one Willoughby certain premises in Brighton, Vt., described in the bill, and took the deed in his own name, and paid $1,000 to said Willoughby, from said fund. The defendant claimed, and his evidence tended to show, that Lewis made

him a present of this $1,233, and directed him to purchase said Willoughby's place with $1,000 thereof, to take the deed in his own name, and to keep the remainder of said fund.

The master reported that Willoughby directed a scrivener to make the deed to Lewis M. Smith, and that "thereupon Willard M. Smith requested that the deed should be made in his name, saying that his brother was in some trouble in regard to being bondsman for some one who had sold liquor, and his property might be taken."

In his bill the orator prayed: "That said premises may be decreed to him, and that the defendant be decreed to execute and deliver to your orator a deed, in due form of law, conveying the title so held by the defendant as aforesaid to your orator; that the defendant be decreed to pay to your orator the balance of the money so received and held by him as aforesaid; that an accounting be had of the money so received by the defendant as rent for the use of said premises as aforesaid, and that upon said accounting the defendant be decreed to pay to your orator the sum or sums of money found in his hands;" for a temporary injunction prohibiting the defendant from selling or incumbering the property, or collecting the rents therefrom; and for general relief.

Harland B. Howe for the orator.

Dale & Amey, and *H. W. Blake* for the defendant.

MUNSON, J. Lewis M. Smith, the orator's decedent, and the defendant were brothers. The defendant conducted the negotiations for the property in question, paid for it out of funds drawn from the bank on assignments received from Lewis, and had himself named as grantee in the deed. The

bill alleges that the defendant was to draw only the sum needed to pay for the place, and that the drawing of the excess and the taking of the deed in defendant's name were fraudulently done. The defendant claims that Lewis transferred the entire fund to him as a gift, with an understanding that the amount required was to be used for the purchase of this place. The findings of the master sustain the orator's contention.

The defendant claims that by the introduction of evidence which indicated that Lewis had the deed taken in defendant's name to avoid liability upon a certain bond, and by the statements of counsel made in connection with it, the orator has put himself in the position of one seeking relief from his own fraud, and that this entitles the defendant to a decree, on the ground that no trust could result to Lewis from a transaction of that character. But it seems clear from the defendant's brief that the testimony referred to as showing this fraud related only to what the defendant said or suggested in regard to his brother's purpose when he requested that the deed be made out to him. If however, it be true that there was testimony tending to show that Lewis entertained the purpose claimed, the master has failed to find the fact established, but on the contrary has found that Lewis did not direct that the title be taken in defendant's name. This leaves no basis for defendant's argument, and renders it unnecessary to inquire as to the soundness or applicability of his legal propositions.

There was evidence tending to show that shortly before the deed was executed the defendant paid Willoughby, the owner of the property, twenty-five dollars to bind the bargain. Mrs. Bassett, a witness for the orator, testified that Lewis requested her to see Willoughby, and that she told de-

fendant what Lewis wanted her to do. She was then asked, subject to defendant's exception, what she told defendant that Lewis wanted her to do about the Willoughby place. Her first answer was not responsive, but upon the question being explained by the master, she replied as follows: "I told him that his brother Lewis wanted me to go down and bind the bargain—he said he had twenty-five dollars. Willard Smith says 'he didn't have—he only had eight dollars, and I loaned him the rest.'" The defendant insists that this evidence of what the witness told him the decedent had said was hearsay, and the indirect introduction of an inadmissible declaration. But the answer shows that the statement complained of was part of a conversation in which the defendant made an admissible declaration, for the accurate presentation and correct understanding of which the preceding remark was necessary. The admission of such a statement in a conversation thus closely connected was not error.

It was not suggested by any of the defendant's exceptions or motions, and it is not now claimed, that the master's conclusions, as stated in his report, do not meet the requirement of the law. The defendant excepted to the report as originally filed on the ground that certain evidence was improperly received, and the report was thereupon recommitted to obtain such findings as might be made without considering some of the testimony covered by the exceptions. Upon this recommitment, the defendant requested the master to state "the facts and evidence" upon which his conclusions were based. The master declined to do this, on the ground that it was not covered by the order of recommitment; and the defendant excepted to the supplemental report, and moved that it be set aside, because of this refusal, and also on the ground that the findings were "against the evidence." But

the master stated in his supplemental report that he had filed with the clerk the transcript of the reporter's minutes containing all the oral evidence on which the report was based, and all the exhibits in the case. The defendant treats this as a reference making the transcript a part of the report, and presents an elaborate review of the testimony in support of his claim that the findings are "against the evidence." It is not necessary to consider the exact force of this expression, or the effect of the master's statement regarding the transcript, or whether the master could properly have taken further action on the defendant's request. It appears from the matters stated in the report that there was evidence before the master which tended strongly to support his conclusions; and this being so, the result must depend upon the master's estimate of the evidence as a whole, and any review of it by the Court would be useless.

The bill charges the defendant with receiving the rents of the property in question, and prays that an account thereof be taken, and that the orator be decreed to pay over the sum found in his hands. The master reports that defendant collected and held the sum of $73.50; that he paid for necessary repairs while this amount was accruing the sum of six dollars, and that all subsequent rents were collected by the orator. The court entered a decree "according to the prayer of the bill." The defendant contends that a decree according to the prayer takes no account of the expenditures and is therefore erroneous. We construe the prayer to ask for the net income of the property, and upon this construction the decree will cover no more than the orator is unquestionably entitled to. The master's submission to the court of the effect that should be given to defendant's letter refusing to pay over further

rents, presented no question that was not sufficiently disposed of by the decree as made.

Decree affirmed and cause remanded.

AHASUERUS CAPEN'S ADMINISTRATOR *v.* CHARLES H. SHELDON, ET AL.

May Term, 1905.

Present: ROWELL, C. J., TYLER, MUNSON, START, WATSON, and POWERS, JJ.

Opinion filed August 1, 1905.

Trespass—Possession—Color of Title—Public Lands—Minister's Lot—Deed Thereof in Fee—Effect—Conditions Subsequent—Forfeitures—Principal and Agent—Independent Contractor—Respondeat Superior—Evidence—Recitals in Deeds—Estoppels.

In trespass *quare clausum* by an administrator, wherein the only defence is that plaintiff has neither legal nor possessory title, defendants cannot take advantage of the recital in plaintiff's quitclaim deed of the premises in question to his intestate, that a certain decree of foreclosure had then become absolute, for defendants are strangers to that deed, and estoppels must be mutual.

A recital, in a deed conveying land appropriated for the use of the first settled minister in the town, that the grantor was such first settled minister, is not binding on a stranger to the deed.

A town charter made a certain tract of land into a township, and incorporated the then and future inhabitants thereof as a town, and conditionally granted said tract of land to certain persons, their heirs and assigns, to be divided into equal shares, one of

which was to be appropriated "for the first settled minister of the Gospel in said town." *Held*, that the proprietors took the title to the minister's lot in their corporate capacity only, and in trust for the use to which it was appropriated, determinable on the settlement of the first minister in town.

Forfeitures are odious in the law, and are never presumed.

The breach of a condition subsequent will not defeat an estate granted by the State until it asserts its right to enforce a forfeiture, and no individual can assail the title for non-performance of the condition.

Unless modified by statute, the conveyance by a trustee, whether to an innocent purchaser or not, and whether in contravention of the trust or not, vests the legal title in the grantee.

But conveyances in fee of our public lands, when the statute authorizes only leases reserving rent, are void as conveyances, though they may operate as licenses to enter, and, if they contain a sufficient description, they give color of title.

In a deed of real estate, a description of the land by metes and bounds and courses and distances is sufficient to give color of title, as is also the description of the lot by name, number and division, it appearing that the town had been divided and alloted.

When one quitclaims real estate of which he is in possession under color of title, that possession passes to his grantee, and the quitclaim deed gives the latter color of title.

A town conveyed in fee a wood lot within its chartered limits, and which its charter appropriated "for the first settled minister of the Gospel in said town." The grantees, under a claim of ownership thereof, immediately went into possession of the lot by going over it several times prospecting for minerals, and by digging a hole near the center of it four or five feet deep, and taking out what they found, and by blasting a rock, and by doing "something on the lot almost every year" for several years. *Held*, that the deed from the town gave the grantees color of title, and that, therefore, their acts upon the land were acts of ownership, constituting possession thereof.

Constructive possession, by virtue of color of title, is a sufficient possession to maintain trespass against a stranger.

The constructive possession of a lot of land by virtue of color of title, is not affected by the fact that one line thereof has been long in dispute, it not appearing that there was ever any actual adverse possession of any part of it.

In trespass for cutting timber, which plaintiff claimed was cut and delivered to defendants by their servant while he was cutting and delivering their timber from adjoining lands, defendants offered to show by one of themselves, and by their books produced by the witness, the total amount of lumber cut and delivered to them from all sources by their alleged servant during the time in question, and claimed that the evidence would show that this amount was less than plaintiff's estimate of the amount cut from the disputed land. On plaintiff's objection that the evidence in the case did not tend to show certain facts which defendants claimed rendered the offered evidence admissible, and that the witness had no personal knowledge except what appeared in the books, and that it did not appear that the books contained a record of all the lumber so delivered, the court excluded the offer. *Held*, that error did not appear; for though the record is referred to, nothing is pointed out in it to show that the court erred; nor is there anything in the offer to show error, for the court might well regard it as not containing enough to obviate the objection.

In trespass for cutting timber, which plaintiff claimed was cut and delivered to defendants by W., while acting as their servant, but who, they claim, was acting under an independent contract to cut and deliver lumber from their land, it was error for the court to decline to instruct the jury on the subject of defendants' liability if their said claim was true; and the mere instruction that if the jury found that W. had trespassed on the land in dispute, the question whether he was defendants' agent was one for the jury to find one way or the other on the testimony, was inadequate.

TRESPASS for cutting timber. Plea, the general issue. Trial by jury at the March Term, 1903, Rutland County, *Haselton*, J., presiding. Verdict and judgment for the plaintiff. The defendants excepted. The opinion states the case.

The defendants also brought to the Supreme Court their petition for a new trial, under V. S. 1662, which petition was heard with their exceptions.

The petition, after alleging that the case had been pending in Rutland County Court since February, 1892, and was

continued for eleven years, during all of which time defendants were ready and willing to try the same, and had their witnesses in court for trial at the September Term, 1902, including Emerson Williams, alleged to have committed the trespasses complained of as defendants' agent, who was then of sound mind and competent to testify, based the prayer for a new trial upon the ground that, when the case came on for trial at the September Term, 1903, they were surprised to find that said Williams, who was their principal witness, was of unsound mind, and incompetent to testify; and upon the ground that the only testimony in the case tending to show that said Williams was the agent of defendants in the committing of the alleged trespasses, were certain admissions made by one of the defendants, when on the stand and unexpectedly confronted with a letter he had written to plaintiff, dated March 18, 1889, with reference to a settlement of said alleged trespasses by Williams, and signed, "Sheldon & Sons," which admissions were made entirely from an inference which the witness then drew as to the import of said letter, and from his recollection of a certain conversation with his father, which, as he later discovered, were wholly erroneous.

Marvelle C. Webber for the defendants.

Plaintiff failed to prove his claim of title. He should have proved that there was a first settled minister, and that he deeded the land to the town of Mendon. *Potter* v. *Washburn,* 13 Vt. 558; *Gardner* v. *Heart,* 1 N. Y. 528; *Davis* v. *Moyles,* 76 Vt. 25; *Stratton* v. *Lyons,* 53 Vt. 641; *Miller* v. *R. Co.,* 71 N. Y. 380; *Price* v. *Brown,* 101 N. Y. 669.

The question of possession was one of fact upon the evidence, and should have been left to the jury. 46 Cent. Dig. 500,

§ 150; *Owings* v. *Gibson,* 9 Ky. 515; *Kinney* v. *Ferguson,* 101 Mich. 178, 59 N. W. 401; *Firth* v. *Veeder,* 58 Hun. 605, 12 N. Y. Supp. 579; *Kilborn* v. *Rewee,* 8 Gray 415.

The acts of Daggett and Stratton cannot be held, as matter of law, to have been acts of possession. *Oatman* v. *Fowler,* 43 Vt. 462; *Sawyer* v. *Newland,* 9 Vt. 383; *Doolittle* v. *Linsley,* 2 Aik. 155; *Hibbard* v. *Foster,* 24 Vt. 542.

The court erred in excluding the offer of defendants to show by one of themselves and by their books the total amount of lumber cut by Williams under his contract. 2 Wigmore Ev. § § 1537-1546, 1560; *Dugan* v. *Mahoney,* 11 Allen 572; *Field* v. *Thompson,* 119 Mass. 151; *Nichols* v. *Haynes,* 78 Pa. 176; *Bushnell* v. *Simpson,* 119 Cal. 658.

The charge of the court as to whether Williams was acting as the servant of defendants was inadequate. *Little Pittsburgh, etc., Co.* v. *Little Chief,* 7 Am. St. Rep. 226; Rhinehart on Agency § 340; *Joel* v. *Morrison,* 6 C. & P. 501; *Bard* v. *Yohn,* 26 Pa. St. 482, 14 Am. & Eng. Enc. 830; *McCarthy* v. *Second Parish,* 71 Me. 318, 36 Am. R. 320; *Hillard* v. *Richardson,* 3 Gray 349; *Linton* v. *Smith,* 8 Gray 147; *Carter* v. *Berlin Mills,* 58 N. H. 52, 42 Am. Rep. 572; 14 Am. & Eng. Enc. 840; *McCafferty* v. *Spuyten Duyvel R. R.,* 61 N. Y. 178; *Clark* v. *Vt. & Canada R. R. Co.,* 28 Vt. 103; *Hass* v. *Phil. & So. Mail S. S. Co.,* 88 Pa. St. 269; 32 Am. Rep. 462; *Mullan* v. *S. S. Co.,* 78 Pa. St. 25, 21 Am. Rep. 2; *Riley* v. *State Line &c., Co.,* 29 La. An. 791, 29 Am. Rep. 349.

Butler & Moloney for the plaintiff.

Plaintiff's deed from the town gave him at least color of title, and he had therefore constructive possession of the whole lot. *Aldrich* v. *Griffith,* 66 Vt. 390; *Hull* v. *Fuller,* 7 Vt. 108;

Shedd v. *Powers,* 28 Vt. 652; *Webb* v. *Richardson,* 42 Vt. 465; *Davenport* v. *Newton,* 71 Vt. 11; *Rice* v. *Chase,* 74 Vt. 366; *Hosford* v. *Whitcomb,* 56 Vt. 651; *Landon* v. *Templeton,* 66 Vt. 180.

Recitals in a deed are presumed to be true, and strangers cannot question them. 1 Greenl. Ev. § § 141, 142, 143; *Cross* v. *Martin,* 46 Vt. 15; *Boyne* v. *Bigelow,* 29 Vt. 179; *Bell* v. *Barron,* 14 Vt. 307.

ROWELL, C. J. This is trespass for cutting timber on lot 19 in the 3d division in Mendon, drawn to the right of the first settled minister. The plaintiff sues as administrator of the estate of Ahasuerus Capen, and claims title by deed, and failing that, title by possession sufficient to enable him to recover against the defendants, who are strangers to all title. The defendants claim that the plaintiff has neither the legal nor a possessory title, and therefore cannot recover.

The plaintiff introduced in evidence a certified copy of the charter of the town of Medway, now Mendon, granted by the Governor of this State on February 23, 1781, whereby a tract of land particularly described was granted to the thirty-five persons named therein, their heirs and assigns, to be divided into equal shares, four of which were to be appropriated to the use of the public, and one of those, "for the first settled minister of the Gospel in said town;" and whereby said tract was incorporated into a township by the name of Medway, and the then and future inhabitants thereof declared to be enfranchised and entitled to all the privileges and immunities that other towns by law exercised and enjoyed; *habendum* on condition that each proprietor, his heirs or assigns, should plant and cultivate five acres and build a house not less than so large on the floor, or have one family settled,

on each right or share within three years from the first day of the then next June, on penalty of forfeiture of each right or share not so settled and improved, the same to revert to the freemen of the State, to be by their representatives regranted to such persons as should appear to settle and cultivate the same. The plaintiff also introduced the record of the divisions of the land in said town, setting out lot 19, and the proprietors' records of the allotments in the second and third divisions, showing the "minister's right" to be No. 19 in the third division.

The plaintiff also introduced a certified copy of the record of a quitclaim deed of said lot from one Elbridge Wellington to the town of Mendon, dated January 25, 1836, wherein the grantor described himself as having been that day regularly installed as minister over the Mendon Union Religious Society, and as being the first settled minister in said town. But it did not otherwise appear whether he was such minister or not.

The plaintiff also introduced a warranty deed from the town of Mendon to himself and one Stratton, dated July 19, 1872, and recorded the 22d of said July, purporting to convey said lot to them in fee for $1,000, and describing it by metes and bounds and courses and distances, and also as lot 19 in the third division of lots in said town, and reciting that the deed was given pursuant to a vote of the town "to sell No. 19, third division, known as the Minister Lot."

It appeared that Daggett and Stratton mortgaged the lot to the town for part of the purchase money, which was foreclosed and a decree obtained, and that on July 24, 1876, the town quitclaimed the lot to Daggett, who, on the same day, quitclaimed it to the intestate. Both deeds were recorded that day, and both described the lot as it was described in

the deed from the town to Daggett and Stratton. But it does not appear that said decree became absolute; for whatever effect the recital in Daggett's deed that it did become absolute might have against him in some circumstances, he is not bound by it here, for the defendants cannot take advantage of it, being strangers to the deed, and estoppels must be mutual. And indeed they do not seek to take advantage of it, nor do they otherwise claim that the decree became absolute; and in fact it did not, as shown by *Daggett* v. *Mendon,* 64 Vt. 323, 24 Atl. 242, to which we are referred in argument.

The plaintiff claims that the recital in Wellington's deed to the town that he was the first settled minister is proof that the fact was so, and that therefore his deed conveyed the fee. But whatever effect that recital might have as between the town and its grantees and those claiming under them, the defendants, who are strangers to the deed, cannot be bound by it any more than they can take advantage of the recital in Daggett's deed. *Davis* v. *Moyles,* 76 Vt. 25, 33, 56 Atl. 174. Wellington's deed, therefore, must be laid out of the case.

The plaintiff also claims that the legal title to the lot vested in the town originally in trust for the use to which it was appropriated, determinable on the settlement of the first minister in the town; and we think that is so, for although the grant is to the proprietors, they took, not in their private, but in their corporate, capacity. *Montpelier* v. *East Montpelier,* 27 Vt. 704; *White* v. *Fuller,* 38 Vt. 193, 200. The defendants claim that as it appears that the lot is wooded and wholly uninclosed, it long since became forfeited under the condition of the charter requiring settlement and cultivation within three years. But forfeitures are odious in law, and are never presumed, but must be proved. This is a condition subsequent and not a limitation, and without considering whether

the shares "appropriated to the use of the public" are within the condition, it is enough to say that a breach of the condition would not defeat the estate until the State asserts its right to enforce a forfeiture, and that the grant coming from the State, no individual can assail the title for non-performance of the condition. *Schulenberg* v. *Harriman,* 21 Wall. 44, 63; *Bybee* v. *Oregon & California R. R. Co.* 139 U. S. 663, 675.

The plaintiff claims that the town's deed to Daggett and Stratton, though purporting to convey the fee, operated upon the legal title, and vested it in the grantees subject to the use when it arises, and that the intestate took that title from Daggett. The defendants claim that said deed is void because in contravention of the statute, which authorized only a lease reserving rent, to be annually paid into the town treasury.

It is true as a general proposition, except as modified by statute, that a conveyance by a trustee, whether to an innocent purchaser or not, and whether in contravention of the trust or not, operates upon the legal title, and vests it in the grantee. But conveyances in fee of our public lands, when the statute authorizes only leases reserving rent, are void as conveyances. *Bush* v. *Whitney,* 1 D. Chip. 369; *Lampson* v. *New Haven,* 2 Vt. 14; *Williams* v. *Goddard,* 8 Vt. 492, 500; *White* v. *Fuller,* 38 Vt. 193, 205; *Victory* v. *Wells,* 39 Vt. 488, 495. But they may operate as licenses to enter. *Lampson* v. *New Haven,* 2 Vt. 14.

As the plaintiff does not claim that the defendants, being strangers to the title, cannot object to the validity of the deed to Daggett and Stratton, that question is not considered.

But that deed gave color of title, for the description of the land is sufficient for that purpose. The description of the lot by name, number, and division is sufficient, it appearing

that the town had been divided and allotted. *Davenport* v. *Newton,* 71 Vt. at p. 18, 42 Atl. 1087; *Hunt* v. *Taylor,* 22 Vt. 556; *Middlebury College* v. *Cheney,* 1 Vt. 336. The description by metes and bounds and courses and distances is sufficient, as the land could be identified by it. 1 Am. and Eng. Ency. Law, 2d ed. 859; 1 Cyc. 1090. And it was identified by it by the parties to the deed at the time it was given, and the south and the west lines in particular were ascertained and located, in the angle of which is the *locus.*

It appeared from Daggett's testimony, which is referred to as to acts of possession, that he and Stratton went into possession of the lot as soon as they bought it by going over it several times to see what there was on it, and prospecting for minerals, and digging a hole near the center of it four or five feet deep, and taking out whatever they found, and by putting one or two blasts into a lime rock on the south-west part where the trespasses complained of were committed, to find out what kind of rock it was, and by doing "something on the lot almost every year" up to the time of the foreclosure, before which, Stratton died, but Daggett was in possession at that time and when the town quitclaimed to him, which, as the case is presented, can be treated only as a discharge of the mortgage on redemption, leaving Daggett in under the warranty deed to him and Stratton.

As that deed gave color of title, and the grantees claimed ownership under it, their acts upon the land, as they can fairly be called acts of ownership, though they might have been acts of trespass in a stranger, will be considered as acts of ownership, and as constituting possession, or an eviction of the town, which was seised only by virtue of its title. *McGrady* v. *Miller,* 14 Vt. 128; *Spear* v. *Ralph,* 14 Vt. 400. In the latter case it was held that cutting a road on a wood

lot by one having color of title, for the purpose of using it in getting off timber and clearing the land, could not be considered less than an act of ownership and a possession.

As Daggett had color of title and possession when he quitclaimed to Capen, the estate created by that possession passed to Capen, and his deed gave him color of title. *Davenport* v. *Newton,* 71 Vt. at p. 17, 42 Atl. 1087.

Now Daggett's testimony tended to show that after he deeded to Capen, he himself did repeated acts of ownership upon the lot by way of taking off timber from time to time up to the time of the trespasses; and we assume, for the contrary does not appear, and the case seems to have gone upon that theory, that he did this by authority of Capen, who died after some or all of the trespasses were committed and before suit brought. There was, therefore, no error in the charge of the court that if the facts in regard to occupation were found to be as Daggett testified, he could maintain the action if the defendants trespassed on the lot, for Capen had constructive possession of the *locus,* which was enough against strangers.

It makes no difference with Capen's constructive possession that the east line of the lot had long been in dispute, for it does not appear that there was any actual adverse possession nor any other constructive possession of any part of it, especially of the *locus. Langdon* v. *Templeton,* 66 Vt. 173, 180, 28 Atl. 866; *Aldrich* v. *Griffith,* 66 Vt. 401, 29 Atl. 376; if one has constructive possession, nothing short of actual possession will deprive him of it. *Soule* v. *Barlow,* 49 Vt. 329.

The defendants did not claim to own 19, but they owned between one and two thousand acres in that vicinity, of which lot 18 was a part, which adjoined 19 on the south. The tres-

passes complained of were committed by one Williams, who, under some contract with the defendants, cut spruce timber on their land in 1887, 1888 and 1889, and had the logs sawed, and delivered the lumber to the defendants at West Rutland at so much per thousand feet. The evidence on the part of the plaintiff tended to show that Williams, in cutting the spruce timber on the defendants' lot 18, chopped over the line onto 19, and thus committed the trespasses complained of; and the plaintiff claimed that the evidence tended to show that the timber taken from 19 by Williams was sawed and delivered to the defendants, but the defendants claimed that it did not thus tend to show.

The amount claimed to have been cut was shown by the plaintiff only by estimating the stumpage, which tended to show a large amount.

One of the defendants was called by them as a witness, and produced the defendants' books, and having given testimony tending to show that he had charge of the books; that they were kept in the usual course of business and were correct; and that he knew of his own knowledge on what lots Williams cut lumber for the defendants in the years named, and what became of the lumber, and what Williams was paid per thousand feet delivered,—offered to show by him and the books the total amount of spruce lumber cut and delivered by Williams to the defendants at West Rutland in said years, and claimed that the testimony would tend to show that the plaintiff's estimates of the amount of timber cut by Williams on 19 exceeded the total amount delivered by Williams at West Rutland during those years from all sources. The plaintiff objected that the testimony did not tend to show that all the timber cut by Williams on defendants' land during those years was delivered by him at West Rutland; that the

witness had no personal knowledge except what appeared in the account between the defendants and Williams; and that it did not appear that the books contained a record of all the lumber cut by Williams on plaintiff's land. This the defendants denied, and the record is referred to. The testimony was excluded.

The court thought the objection well taken; and though the record is referred to, nothing is pointed out in it to show that the court was in error. Nor is there anything in the offer to show error, for the court might well regard it as not containing enough to obviate the objection.

The plaintiff claimed that the evidence tended to show that the defendants had control of Williams, and that he was cutting under their direction, and was their agent and servant. The defendants claimed that the evidence had no such tendency.

The court declined to charge the jury on the subject of the defendants' liability if Williams was acting under a contract to cut and deliver lumber from their land, but charged that if they found that Williams trespassed on 19, the question whether he was the defendants' agent—whether he acted for them, was one for the jury to find one way or the other on the testimony; that unless he was acting for them, they would not be liable. This was all the court said on the subject.

The defendants excepted to what the court said as to the defendants' liability for the acts of Williams, for that it was inadequate; and excepted because the court did not submit the branch of the case as to the defendants' liability if Williams was acting as a contractor to cut timber on their land and deliver the manufactured product at an agreed price per thousand feet.

We think the charge did not fully meet the requirements of the case on these points. It is true, as the court said, that the defendants would not be liable unless Williams was acting for them as their agent; but the jury should have been told what would make him thus acting, and what would make him acting for himself and as his own master, for otherwise they would not know that to make him the agent of the defendants it was necessary that he should be subject to their direction and control in respect of the means and manner of doing the work, and not be at liberty to act independently of them in that regard; and how that was, was a controverted question. The jury might have thought from the charge that the fact that Williams was acting under the defendants' employment made him their agent, and would not understand that that was not enough, but that it was necessary to find that that employment created the relation of master and servant between them, which is the foundation of the doctrine of *respondeat superior.*

Judgment reversed and cause remanded.

The petition for a new trial on the ground of surprise and newly discovered evidence has no merit, and is dismissed with costs.

STATE *v.* ABRAM H. ABRAHAM.

January Term, 1904.

Present: ROWELL, C. J., TYLER, MUNSON, START, AND WATSON, JJ.

Opinion filed August 12, 1905.

Constitutional Law—Class Legislation—Statutes—Unconstitutional in Part—Practice of Pharmacy—V. S. 4662, 4663.

The purpose of V. S. Chapter 192, relative to the practice of pharmacy, is to secure the safety of the public, and any discrimination in favor of a particular class of dealers in drugs and medicines must be based upon some difference which has a just relation to that purpose.

V. S. 4662, as amended by No. 112, Acts 1902, forbidding any unlicensed pharmacist to practice pharmacy, is rendered wholly void by the unconstitutional discrimination made by its provision: "The provisions of this act shall not apply to a widow of a registered pharmacist, or the administrator of the estate of a deceased registered pharmacist."

The sale at retail of drugs, medicines, and poisons is included in the practice of pharmacy.

That exception in V. S. 4663, which permits dealers in general merchandise to sell "drugs, medicines, and poisons" without a license is an unconstitutional discrimination and, therefore, void; but that clause is separable from the rest of the section, and, with V. S. 4662 as amended, may be rejected without otherwise interfering with V. S. Chap. 192.

INFORMATION for practicing pharmacy without a license. Heard on a demurrer to the information at the March Term, 1903, Rutland County, *Haselton,* J., presiding. Demurrer overruled, and information adjudged sufficient. The respondent excepted.

Butler & Moloney for the respondent.

The Legislature cannot, constitutionally, give licensed pharmacists the exclusive right to sell patent medicines and drugs, nor discriminate against dealers in general merchandise. *Noel* v. *People,* 79 Am. St. Rep. 243; *Gulf Colo. Co. etc.* v. *Ellis,* 165 U. S. 150; *State* v. *Gardner,* 65 Am. St. Rep. 785; *State* v. *Donalson,* 41 Miss. 74.

Wm. H. Preston, State's Attorney, for the State.

MUNSON, J. This demurrer raises the question whether V. S. 4662, as amended by No. 112, Acts of 1902, is constitutional. This section, so amended, declares that it shall be unlawful for any person not licensed as a pharmacist to practice pharmacy, or to indicate in any manner that his place of business is used as a pharmacy, or "to expose for sale at retail any drugs, chemicals or poisons," unless such place of business shall be conducted, managed or controlled by a licensed pharmacist in accordance with the provisions of the act. The amended section is a part of Chapter 192 of the Vermont Statutes, relating to the practice of pharmacy. Section 4663 of this chapter provides that nothing in the chapter shall be construed to apply "to the sale of drugs, medicines and poisons" by dealers in general merchandise. It is claimed that these provisions create an unjust discrimination between general merchants and other unlicensed dealers in drugs.

Section 4662 makes it unlawful for an unlicensed person to practice pharmacy; and it is clear that the sale at retail of drugs, medicines and poisons is included in the practice of pharmacy. This section also forbids in various terms the advertising of such person's place of business as a place so used. But the exception in section 4663 permits dealers in general merchandise to sell "drugs, medicines and poisons"

without a license. This permission carries with it, in the absence of express limitation, the right to advertise the business thus permitted. So we have the privilege of advertising and selling drugs, medicines and poisons accorded to general merchants and denied to unlicensed pharmacists; and our next inquiry is, whether there is a sufficient ground for discriminating between these classes.

We think the discrimination cannot be sustained. The general purpose of the chapter is to secure the safety of the public, and any discrimination in favor of a particular class of dealers must be based upon some difference that has a just relation to that purpose. If unskilled and incompetent owners of pharmacies cannot be trusted to sell drugs, medicines and poisons at retail, there is no apparent reason why dealers in general merchandise should be permitted to sell them. The constitutional provision and the application of it have been so fully considered in recent cases that a more extended treatment of the question seems unnecessary. *State* v. *Harrington,* 68 Vt. 622, 35 Atl. 515; *State* v. *Hoyt,* 71 Vt. 59, 42 Atl. 973; *State* v. *Cadigan,* 73 Vt. 245, 50 Atl. 1079; *State* v. *Shedroi,* 75 Vt. 277, 54 Atl. 1081; *State* v. *Scampini,* 77 Vt. 92, 59 Atl. 201.

The amended section also provides that the act (chapter) shall not apply to the widow of a registered pharmacist, or the administrator of the estate of a deceased registered pharmacist. This exception may have had its origin in some idea regarding the necessity of a sale in the settlement of estates, but the provision is so sweeping that it authorizes unskilled persons to do, without limitation as to time or stock, everything that is prohibited to other owners of like property. This exception is clearly within the reason given in disposing of the previous point.

It remains to determine how much of the chapter must be eliminated to relieve it of this objection. We think the frame and substance of section 4662 as amended, and the nature and scope of the business to which it relates, are such that the entire section must be stricken out. The clause of section 4663 which makes the exception in question, is separable from the rest of the section; and this clause, with section 4662 as amended, may be rejected without otherwise interfering with the chapter. We hold that V. S. 4662, as amended by section two of No. 112 of the Acts of 1902, and the clause of V. S. 4663 which relates to dealers in general merchandise, are unconstitutional and void.

Judgment reversed, demurrer sustained, information adjudged insufficient, and respondent discharged.

FRANK MORGAN *v.* M. E. TUCKER.

October Term, 1904.

Present: ROWELL, C. J., TYLER, MUNSON, WATSON, and HASELTON, JJ.

Opinion filed August 15, 1905.

Contracts—Inability to Fully Perform—Further Performance Forbidden—Effect.

One party to a contract cannot, to prevent anticipated loss, stop performance by the other party, without becoming accountable for the damages caused by the interruption.

In an action for breach of contract, it appeared that, for a stipulated price per thousand feet, plaintiff agreed with defendant to cut and deliver at defendant's mill all the saw logs on certain

land, and to complete the work by May 1. Plaintiff's evidence tended to show that on March 13, and while he was drawing the logs which he then had cut, there came a heavy thaw, which destroyed that season's sledding, and forced plaintiff to cease drawing the logs which he then had cut, and to resume chopping; whereupon defendant forbade plaintiff to do any further cutting till he had delivered the logs then cut, and thereupon plaintiff did no more cutting and never completed the job. *Held*, that this evidence tended to place the responsibility for the non-performance of the contract on defendant; that even if plaintiff's previous management made it morally certain that the logs would not be drawn, it could not be said that he had put it out of his power to perform, and, therefore, it was error to direct a verdict for the defendant.

GENERAL AND SPECIAL ASSUMPSIT. Pleas, the general issue with notice, and payment. Trial by jury at the December Term, 1903, Lamoille County, *Start*, J., presiding. Verdict ordered for the defendant, and judgment thereon. The plaintiff excepted. The special count in the declaration was for breach of the logging contract mentioned in the opinion.

B. A. Hunt for the plaintiff.

Thomas C. Cheney for the defendant.

MUNSON, J. Plaintiff agreed with defendant to cut and deliver at defendant's mill all the saw logs standing on certain land, and to have the job completed by May first, 1902. The plaintiff did not complete the job, and did practically nothing on it after March thirteenth, the date of a heavy thaw. The plaintiff claimed that the defendant forbade further chopping, and thus prevented the completion of the job. A verdict was directed for the defendant.

The evidence of the plaintiff tended to show that to have continued drawing at that time would have spoiled the roads,

and that for that reason he proposed to stop drawing and resume the work of cutting and skidding; that thereupon the defendant said he had rather have the timber standing than down, and that he didn't want the plaintiff to cut any more until he had got all that was down drawn in; that upon this plaintiff told defendant he couldn't keep his men idle, and if he couldn't cut and skid he should have to turn them off; that defendant replied that he couldn't help it—he didn't want any more cut; and that because of this plaintiff discharged his men and did no more cutting.

This evidence tended to place the responsibility for the non-performance of the contract on the defendant, unless its effect was controlled by other matters disclosed by the testimony. It appeared from the plaintiff's cross-examination that he had his roads all made, and had worked on the least accessible part; that he had about two hundred logs cut that were not drawn, and that there were about one thousand more to cut; that the sledding in fact broke up with this thaw; that he went back a little later and tried to draw, but that the roads were bad and he couldn't accomplish much; that if the weather had turned he might have finished with the help he had in three or four weeks, and that he could have put on more teams if the logs were cut ready to draw; that it injures spruce logs some to lie in the woods, and that the defendant gave as a reason why he wanted no more cut that he was afraid they would lie there. The plaintiff's answers in direct and cross-examination as to what he could have done or expected to do were inconsistent, evidently influenced by the questions, and not such that one can be considered explanatory and corrective of the other.

The plaintiff had over six weeks left in which to complete the contract. The cutting was the first step in the work

to be done. Any interference with this might prevent a performance, whatever the opportunities afforded by later conditions. A heavy fall of snow with a prolonged season of cold might even then have enabled the plaintiff to finish the drawing on runners. It was not beyond the bounds of possibility that he might finish it on wheels over poor roads. The effect of his previous failures to advance the work could be overcome by the employment of a larger force. The terms of the contract were such that he could complete the work at a considerable loss and still gain in the final settlement. Even if his previous management made it morally certain that the drawing would not be done, it could not be said that he had put it out of his power to perform.

The defendant could not stop performance to prevent anticipated loss without becoming accountable for the damages caused by the interruption. There was nothing in the contract that authorized him to regulate the relative progress of the cutting and drawing. The only protection he provided for was the retention of one and one-half dollars per thousand until the job was completed, which amounts to nearly two hundred dollars on the logs delivered. By the course taken he assumed, not only to hold the money reserved as a guaranty to secure the completion of the job, but so to control the action of the plaintiff as to avoid all risk of incurring loss from an unsuccessful attempt to complete it.

It is clear that there were questions involved in the case as presented that could not be disposed of by directing a verdict for the defendant.

Judgment reversed and cause remanded.

ARMOUR & COMPANY *v.* J. J. WARD & CO.

October Term, 1904.

Present: ROWELL, C. J., TYLER, MUNSON, WATSON, HASELTON, and POWERS, JJ.

Opinion filed August 15, 1905.

Partnership—Pleading—Non-Joinder of Party Defendant—Matter of Abatement—V. S. 1179.

V. S. 1179, providing that in an action on contract judgment may be taken against such defendants as are found liable, notwithstanding it is found that all the defendants are not jointly liable, does not authorize a judgment against one defendant upon a joint liability.

The non-joinder of a party defendant is matter of abatement, and cannot be taken advantage of under the general issue.

Two persons were declared against in assumpsit as partners. Service was made on only one defendant, who alone appeared. *Held*, that, by pleading to the merits, this defendant waived his right to have his co-obligor before the court.

GENERAL ASSUMPSIT. Pleas, the general issue, and accord and satisfaction. Trial by jury at the September Term, 1903, Windham County, *Start*, J., presiding. Verdict and judgment for the plaintiff. The defendant excepted.

F. D. E. Stowe for the defendant.

V. S. 1179 does not apply here. *Green et al.* v. *Chapman*, 26 Vt. 236; *Machine Co.* v. *Morris*, 39 Vt. 393; *Smith* v. *Kellogg*, 46 Vt. 560.

E. L. Waterman, J. L. Martin and *E. W. Gibson* for the plaintiff.

The non-joinder of a party defendant can be taken advantage of only by a plea in abatement. Collyer on Part. § 713; 1 Chit. on Pl., 46; Whelpdale's Case, 5 Coke 119 A; 2 Taunton 254; 1 Saund. 154; 5 T. R. 651; 1 East 20; 4 T. R. 725; 2 Bla. 947, 3 Camp. 50; Gould's Pl. 278; *Rice* v. *Shute,* 5 Burr 2611.

Under V. S. 1179 plaintiff properly took judgment against Ward alone. *Reynolds* v. *Field,* 41 Vt. 225; *Powers* v. *Thayer,* 30 Vt. 363; *Hurlburt* v. *Hardy et al.,* 27 Vt. 245; *Nash* v. *Skinner,* 12 Vt. 219.

MUNSON, J. J. J. Ward and M. L. Kirkwood are declared against in general assumpsit as partners. Kirkwood was not served, and did not appear. Ward pleaded the general issue and accord and satisfaction, and testified that he made a certain arrangement with plaintiff's agent in full satisfaction and discharge of the claim as against him individually; but plaintiffs recovered. The exceptions are to the refusal to direct a verdict for the defendant, and the refusal to charge that a recovery could not be had against one partner alone.

The judgment was not authorized by V. S. 1179. That provides that a judgment may be taken against such defendants as are defaulted and such as are found liable, notwithstanding it is found that all the defendants are not jointly liable. This judgment was rendered against one defendant upon a showing of joint liability.

But the defendant is not in a position to attack the judgment. It is well settled that the non-joinder of a party defendant is matter of abatement, and cannot be taken advantage of under the general issue. *Nash* v. *Skinner,* 12 Vt. 219; *Ives* v. *Hulet,* 12 Vt. 314; *McGregor* v. *Balch,* 17 Vt.

562; *Hyde* v. *Lawrence,* 49 Vt. 361. In this case the defect is not in the pleadings, but in the service. It was a defect apparent from the papers, and could have been reached by motion to dismiss. Ward's right to have his co-obligor before the court was a right that could be waived, and it must be held to have been waived by pleading to the merits. If the objection had been made by a dilatory plea, the plaintiffs might have been able to complete the service. See *Pike* v. *Blake,* 8 Vt. 406.

Judgment affirmed.

AMOS A. HALL ET AL. v. MARGARET F. C. TURNER'S ESTATE.

May Term, 1905.

Present: ROWELL, C. J., TYLER, MUNSON, START, WATSON, HASELTON, and POWERS, JJ.

Opinion filed August 22, 1905.

Guardian and Ward—Mingling Trust Funds—Dealings With Ward—Settlement With Ward After Full Age—Duty of Guardian to Disclose Essential Facts—Acquiescence of Ward in Settlement—Effect.

When a guardian, who has received money in trust for her ward, mingles with it her own funds and invests it in her own name, she must account for it in money, unless the ward has become barred of his right to insist upon such accounting.

A guardian who has received money in trust for her ward, cannot make a valid contract with him, while he is a minor and under her guardianship, for the transfer to him of bank stock in discharge of her liability to account for the trust fund.

A guardian mingled with her own funds and invested in her own name, a money legacy received by her in trust for her infant ward, from an estate of which she had been administratrix; and shortly before the ward became of age she transferred to him four shares of bank stock, which he continued to hold till more than six years after he became of full age, when he signed a receipt acknowledging the receipt of said stock from her as administratrix of said estate. After the decease of the guardian, and after the failure of the bank, in an action by the ward against the guardian's estate to recover the legacy, *Held*, that it not appearing that the claimant during the lifetime of the guardian, knew of the facts which entitled him to reject the stock and to demand and receive the trust fund in money, the transfer of the stock did not operate as payment, and his claim is not barred by lapse of time or acquiescence.

APPEAL from the decision of commissioners disallowing the claims presented by Amos H. Hall, Carleton A. Hall, and John A. Hall against the estate of Margaret F. C. Turner. Heard on the report of a referee at the September Term, 1904, Washington County. Judgment for the claimants, Carleton A. Hall and John A. Hall, to recover the sum found due by the report. Judgment, *pro forma*, for the defendant against Amos H. Hall, who excepted.

The deceased was guardian of all the appellants and trustee of a money legacy to them from their grandfather. Amos H. Hall became of full age February 17, 1893, and he received a dividend of $16 on the bank stock, July 8, 1893. The receipt mentioned in the opinion was signed by him in 1899, "more than six years after he became of full age," and besides the $400 in bank stock received in 1893, shows that in 1898 he received $75.33, and in 1899, $10.07, and the referee reports that he did receive those sums from the deceased in those years, and adds that he is "unable to clear his mind of the impression that the receipt was a receipt given by Amos H. Hall for his share of the fund left by his grandfather."

The bank went into the hands of receivers and ceased to do business on February 21, 1901. An assessment of 20% was made in 1898, and Amos Hall paid his assessment, amounting to $60, his number of shares having been reduced from four to three.

Heaton & Thomas and *Plumley & Plumley* for Amos H. Hall.

A trustee must not mingle trust funds with her own. *Clement* v. *Clement,* 19 N. H. 460; *Norwood* v. *Harness,* 98 Ind. 134; *Hun.* v. *Cary,* 82 N. Y. 65; Perry, Trusts, § 452; *Gray* v. *Fox,* 1 N. J. Eq. 259; *Sparhawk* v. *Sparhawk,* 114 Mass. 356; *Utica Ins. Co.* v. *Lynch,* 11 Page 520; *Knowlton* v. *Bradley,* 17 N. H. 458; *McAllister* v. *Com.,* 30 Pa. St. 536; *Webster* v. *Pierce,* 35 Ill. 158; *Shaw* v. *Bauman,* 34 Ohio St. 25.

The law presumes undue influence in contracts between guardian and ward, which result to the ward's disadvantage. *In Re Cowdry's Will,* 77 Vt. 359; *Wade et al.* v. *Pulsifer et al.,* 54 Vt. 45; *Tucke et al.* v. *Buchholz,* 43 Iowa 415; *Spalding* v. *Brant et al.,* 3 Md. Ch. Dec. 411; *Stark* v. *Gamble,* 43 N. H. 465; *Van Rees* v. *Wilzenberg,* 83 N. W. 787.

George W. Wing for the defendant.

START, J. This is an appeal from the disallowance of claims presented to the commissioners on the estate of Margaret F. C. Turner. The case was heard in the county court on the report of a referee.

The claim of Amos H. Hall is for a legacy under the will of one Olive A. Fisk, mother of Mrs. Turner, and grand-

mother of the claimant; of which will Mrs. Turner was executrix. The county court disallowed the claim presented by Amos H. Hall, and the case is here on his exception to such disallowance, and the only question presented for consideration is, whether the facts found by the referee, show a payment and discharge of the claim by the transfer of four shares of the capital stock of the Citizens' Bank of La Cygne, Kansas, to the claimant by Mrs. Turner. Mrs. Turner was appointed trustee of said legacy and guardian of the claimant by the probate court, and received the legacy in money; mingled it with her own moneys, and invested it in her own name. She never settled her account with the probate court and the trust relation continued until her death, unless it was terminated by the transfer of the bank stock. The guardian and trustee having received the legacy in money, mingled it with her own moneys, and invested it in her own name, she was holden to account for it in money, and her estate is thus accountable, unless the claimant is barred of his right to insist upon such accounting by reason of his receiving and holding the bank stock under the circumstances found by the referee. *Drake* v. *Wild,* 65 Vt., 611, 27 Atl. 427; *Re Hodges' Estate,* 66 Vt. 70, 28 Atl. 663.

Mrs. Turner did not receive the bank stock from the estate of Olive A. Fisk, nor did she purchase it for or in the name of the claimant. In January 1892, she purchased seventy-six shares of the capital stock of the bank, the stock of which is in question, the par value of each share being one hundred dollars, and on the 1st day of January, 1893, she transferred four shares of this stock to the claimant, who was then a minor and under her guardianship, and after he reached his majority he signed a receipt acknowledging the receipt of the stock from Mrs. Turner as administratrix of his grand-

father's estate. The referee finds that this receipt was given for the claimant's share of the fund left by his grandmother, but the referee says that he "does not find that said Amos H. Hall knew the four shares represented the portion due him from the estate of Olive A. Fisk."

The capital stock of the bank was originally fifty thousand dollars, but after the transfer of stock to the claimant, it was reduced to twenty thousand dollars, and he paid an assessment of sixty dollars on the shares transferred to him. The bank is now in the hands of a receiver, and has been for four years. It is not found that the stock is of any value. Upon this subject the referee says that nothing appeared before him upon which to base a finding as to the value of the stock at any time before or since the bank failed. It does not appear that the guardian and trustee informed the claimant, or that he knew, anything about the affairs of the bank, or the value of the stocks at the time he received it, or at the time he signed the receipt. The referee does not find that the claimant was informed or knew that the four shares of stock represented the portion due to him from the estate of Olive A. Fisk; nor that he knew that anything was or would be due to him from that estate; nor that the guardian and trustee informed him where the fund came from, in what form it came to her hands, in what capacity she held it, or that she gave him any information that would aid him in determining his rights in the premises.

It was her duty to inform him of the facts which entitled him to reject the stock and to demand and receive the trust fund in money on reaching his majority. He had a right to know from her, and it was her duty to inform him, that she held this legacy in trust for him; that it came to her in money; that she mingled it with her own moneys, and invested it in

her own name; that she did not purchase the stock for him nor in his name; that the stock did not come to her hands from the estate of Olive A. Fisk; and that the stock, as such, never came to her hands in trust for him. The burden was on the defendant to show that the claimant was thus informed, but the case is barren of any facts which show that the guardian and trustee performed her duty in these respects. In the absence of such showing it must be taken that the claimant was not thus informed, and that he took the stock in ignorance of essential and controlling facts affecting his rights, which the guardian and trustee was bound to disclose to him. The claimant having taken and held the stock, in so far as appears, until after the decease of the guardian and trustee, in ignorance of material and controlling facts affecting his rights, which he had a right to know from the guardian and trustee, he is not bound by his acceptance of it, and his receiving and holding it did not have the effect of a payment and discharge of his claim. *Wade* v. *Pulsifer,* 54 Vt. 45; *Re Cowdry Will,* 77 Vt. 359, 60 Atl. 141; *Re Hodges Estate,* 63 Vt. 661, 22 Atl. 725; *Scoville* v. *Brock,* 76 Vt. 385, 57 Atl. 967.

The transfer of the stock, if it related to the claim in question as is claimed by the defendant, was in effect an attempt on the part of the guardian and trustee to make a contract with her ward, while he was a minor and under her guardianship, for the sale of the stock to him and apply its par value in discharge of her liability to account for the trust fund. This she could not do. She could make no legal contract with him during his minority, and the taking of his receipt after he attained his majority acknowledging that he had received the stock from her as administratrix of his grandfather's estate was not an affirmance of the claimed con-

tract; for, as we have seen, the receipt was given in ignorance of material and controlling facts affecting the transaction, which he was entitled to know from the guardian and trustee; also the receipt in no way refers to the claim in question. It is an acknowledgment that the claimant has received four shares of stock from Mrs. Turner as administratrix of his grandfather's estate; and he did not know that it was intended for a purpose other than its plain import.

In 15 Am. & Eng. Enc. 86, is it said that "after the ward attains majority but before the guardian's accounts have been settled, while the disability of infancy has been removed, that arising from the trust relation is slightly, if at all, diminished, and contracts between the guardian and ward are either conclusively or presumptively deemed void." And on page eighty-seven of the same volume many cases are cited in support of the rule, that the considerations which cast suspicion upon a contract between guardian and ward made soon after the ward's majority apply with at least equal force to a settlement of the guardian's account agreed upon between them; and the court will not sustain such a settlement as a bar to the ward's rights unless it is clearly shown that the settlement was a fair one, and that the ward acted in entire freedom from the guardian's influence and upon full knowledge as to the facts and his rights thereupon. The case of *Scoville* v. *Brock,* before cited, is also an authority for this rule.

It not appearing that the claimant at any time during the lifetime of the guardian and trustee, knew of the facts that entitled him to repudiate the transfer of the stock and to demand and receive the trust fund in money on reaching his majority, his claim is not barred by lapse of time or acqui-

escence. The burden was upon the defendant to show such knowledge. *Wade* v. *Pulsifer*, 54 Vt., 45.

The pro forma judgment of the county court is reversed, and judgment is entered for the plaintiff, Amos H. Hall, to recover seven hundred thirty-eight dollars and nineteen cents, with interest on said sum from November 2, 1904, and his costs. This judgment is to be certified to the probate court.

CHARLES JENNETT *v.* HENRY PATTEN.

May Term, 1905.

Present: ROWELL, C. J., TYLER, MUNSON, START, WATSON, and HASELTON, JJ.

Opinion filed September 30, 1905.

Trespass—Evidence—Adverse Party as Witness — Impeachment—V. S. 1246 — New Trial — Misconduct of Jurors—Waiver.

A party is not concluded by the testimony of his own witness, but may show that facts relevant to the issue are contrary to what such witness has stated them to be.

V. S. 1246 gives one party the right to call the adverse party as a witness and cross-examine him, and this Court cannot go behind the record and find that the plaintiff, in exercising this right, had "a deliberate plan to disparage and destroy the credit to be given defendant's testimony."

In trespass for assault and battery, after plaintiff had called defendant as his first witness and had fully cross-examined him, it was proper to allow plaintiff, and his daughter and hired boy—who were the only witnesses to the affray, and who were excluded from the court room while defendant testified—to give in evidence their

versions of the occurrence, for the purpose of showing what actually took place and not to impeach defendant, although their testimony contradicted his on material points.

After the testimony and arguments were closed and before the charge, two of the jurors who were trying the case called at defendant's house, and at their request he showed them certain objects and localities, which had been testified about in the trial and were material to the issue. After verdict defendant moved to set it aside on account of this misconduct of the jurors. The court found that defendant was in court and heard the charge, and failed to inform either the court or his counsel of the misconduct of the jurors till after verdict was rendered against him. *Held*, that by his omission to call the matter to the court's attention he waived his right to take advantage of the conduct of the jurors.

TRESPASS for assault and battery. Plea, not guilty and self-defence. Trial by jury at the September Term, 1904, Chittenden County, *Powers*, J., presiding. Verdict and judgment for the plaintiff. The defendant excepted. The opinion states the case.

Palmer, Foster & Russell for the defendant.

J. J. Enright and *R. E. Brown* for the plaintiff.

TYLER, J. This action is trespass for an assault and battery; pleas not guilty and self-defence; verdict for the plaintiff. The plaintiff's evidence tended to show that he and the defendant met in a barn, where they had a right to be, and that words passed between them, resulting, as the plaintiff claimed, in the defendant's assaulting him. The defendant claimed that he acted in self-defence.

The exceptions state that the plaintiff called the defendant as his first witness and examined him on all points as fully as he would have been allowed to do in cross-examination if he had been called as a witness in his own behalf. The

plaintiff and witnesses called by him were then allowed to testify about the assault, and, so far as their testimony tended to contradict the defendant's testimony upon the subjects upon which he had testified, it was received under his objection and exception. This evidence was offered and admitted for the purpose of showing what actually took place between the parties and not to impeach the defendant, although it contradicted the testimony given by him upon material points.

The right of one party to call the adverse party as a witness and cross-examine him is given by V. S. 1246, which is:

"A party to a civil action or proceeding at law or in equity, may compel an adverse party * * * to testify as a witness in his behalf, in the same manner and subject to the same rules as other witnesses. But the party so called to testify may be examined by the opposite party under the rules applicable to the cross-examination of witnesess."

We cannot go behind the record and find what the defendant claims—that there was "a deliberate plan made by the plaintiff to disparage, destroy and render useless the credit to be given to the defendant's testimony." It appears that the plaintiff's daughter and hired boy were the only witnesses of the affray, and that they were excluded from the courtroom while the defendant testified. Afterwards these witnesses and the plaintiff himself gave their versions of the occurrence as they claimed to have seen it.

In *Cox* v. *Eayres,* 55 Vt., on page 28, it is said: "It is also well settled that a party is not bound by the testimony of his own witness, but is at liberty to show that facts relevant to the issue are otherwise than as he has stated them to be, although the effect of such showing may be to discredit the

witness." Wigmore on Ev. § 908, says: "It has been noted, (Sec. 897), that a chief reason for the victory of the newer notion was the perception that without it, one could not prove the facts of his case, if the first witness called were to testify untruly. From this point of view the discrediting of the witness is regarded as incidental only (because inevitable) to this other and necessary right."

It does not appear that the plaintiff's evidence was introduced for the purpose of discrediting the defendant, nor that the plaintiff exceeded his right under the statute; therefore this exception is not sustained.

After the testimony and arguments were closed and before the charge was given to the jury, two jurors, on their way to their homes, on Saturday afternoon, called at the defendant's house and at their request were by him shown certain objects and localities which had been testified about in the trial and were material to the issue. They also asked him certain questions which he answered. After verdict the defendant moved to have the verdict set aside by reason of this misconduct of the jurors, and testimony was taken in support of and in opposition to the motion. It was found that the defendant was in court on Monday and heard the charge of the court, and did not make these facts known to the court nor to his counsel until after the verdict was rendered, hoping, as the court found, "that he would derive an advantage in the result of his case by reason of the information obtained by said jurors as aforesaid."

It is unnecessary to comment upon the misconduct of the defendant, or that of the two jurors in violation of their oath and of the emphatic instructions of the court given them on Saturday to hear nothing said about the case nor to receive any information concerning it during the recess. It is suffi-

cient to say that the defendant's omission to call the court's attention to these facts brought the case within the settled rule laid down in *Whitcher* v. *Peacham,* 52 Vt. 242. See also *Scott* v. *Moore,* 41 Vt. 205; *Badger* v. *State,* 69 Vt. 147; *McKinstry* v. *Collins,* 74 Vt. 147.

Judgment affirmed.

FRANK F. MARCY *v.* CHESTER S. PARKER.

May Term, 1905.

Present: TYLER, MUNSON, START, WATSON, HASELTON, and POWERS, JJ.

Opinion filed October 25, 1905.

Trover — Plaintiff's Title—Naked Possession—Evidence—Plans—Verdict—Motion to Set Aside—Harmless Error—New Trial—Affidavits of Jurors.

A person who has the actual possession of personal property has a title thereto sufficient to enable him to maintain trover against a mere stranger for its conversion.

In such case, in order to defeat recovery, the defendant must not only show a better title in some other person, but must also so connect himself with such other person that he can stand upon his right.

In trover for a quantity of lumber, the taking of which was justified under certain conditional sale notes given by one Lang to a third person, evidence examined and *held*, that a quitclaim deed and two leases of the premises where the lumber in question was piled, executed by Lang to plaintiff, and a certain lumber contract made between them, were admissible as tending to show plaintiff's possession of the lumber in question at the time it was taken.

In trover for a quantity of lumber, a plan which correctly showed the location of six piles of lumber, from four of which plaintiff claimed that defendant had taken lumber, was admissible in connection with the testimony of the witness who made it, to explain his testimony as to what lumber defendant had moved, although two adjacent piles of lumber concerning which there was no controversy, were not represented on the plan.

Though objection is made to the admission of evidence, unless an exception is taken the question is not reserved.

The answer of a witness, that he did not know as he could answer correctly, that it was a matter to which he never had paid much attention, shows that the error, if any, in allowing the question to be answered was harmless.

A motion to set aside a verdict as being against the weight of the evidence is addressed to the discretion of the trial court, and its action thereon is not revisable.

In trover for a quantity of lumber, evidence examined and *held*, that a motion to set aside the verdict, upon the ground that there was no evidence tending to support it, was properly overruled.

Affidavits of jurors who sat upon a case to the effect that they misunderstood the law of the case, or the instructions of the court, come within the well settled rule that affidavits of such jurors will not be received to impeach or set aside their verdict.

TROVER for a quantity of hard wood two-inch plank. Plea, the general issue. Trial by jury at the September Term, 1904, Orleans County, *Rowell,* J., presiding. Verdict and judgment for the plaintiff. The defendant excepted.

After verdict, and before judgment, the defendant moved to set aside the verdict for the reasons stated in the opinion. This motion was overruled to which the defendant excepted.

The defendant also brought a petition for a new trial, under V. S. 1662, to the May Term, 1905, of the Supreme Court for the county of Orleans. This petition was heard with the defendant's exceptions. The petition was based upon the allegation "that the charge of the court with respect to damages was so framed that the jury understood from the

charge that, if your petitioner moved and sold any planks which were not covered by the lien notes, then the jury should render a verdict for the plaintiff for all of the planks moved and sold by your petitioner, notwithstanding a large part of the plank moved and sold was covered by said lien notes." The opinion fully states the other facts.

Young & Young, and *B. F. D. Carpenter* for the defendant.

Even a *bona fide* purchaser for value and without notice is not protected as against the holder of a valid lien note on the property purchased. *Sargent* v. *Metcalf,* 5 Gray 306; *Deshon* v. *Bigelow,* 8 Gray 159; *Whitney* v. *Eaton,* 15 Gray 225; *Hirshorn* v. *Canney,* 98 Mass. 149; *Forbes* v. *March,* 15 Conn. 384; *Hart* v. *Carpenter,* 24 Conn. 427; *Cole* v. *Mann,* 62 N. Y. 1; *Bean* v. *Edge,* 84 N. Y. 510; *Harkness* v. *Russell,* 118 N. Y. 663.

Defendant's motion to set aside the verdict should have been granted. If one party makes a *prima facie* case and the same is not rebutted, and the jury disregard such *prima facie* case and render a verdict against such evidence, the verdict should be set aside. *Kelley* v. *Jackson,* 31 U. S. 6 Pet. 622; *Corlies* v. *Little,* 14 N. J. L. 373; *Mumford* v. *Smith,* 1 Caines (N. Y.) 520; *Backus* v. *Clark,* (Kan.) 83 Am. Dec. 437; *Hall* v. *Page,* 4 Ga. 428, 48 Am. Dec. 235.

The admission of the plan prepared by Hunt was error. Wigmore Ev. § § 790, 793; *Hale* v. *Rich,* 48 Vt. 217.

The petition for a new trial should be granted. The jury misunderstood and misapplied the instructions of the court. *Brigham* v. *Eddy,* 97 Mass. 478.

J. W. Redmond, and *W. R. Aldrich* for the plaintiff.

Naked possession, whether rightful or obtained by force or fraud, is sufficient to sustain trover against a mere stranger. *Knapp* v. *Winchester,* 11 Vt. 351,

The evidence of plaintiff tends to show that he owned the lumber in question. "The owner of personal property is considered in law as in possession, and, not having parted with his right of possession, he may sustain trover for its conversion, though it never was in his actual possession." *Edwards* v. *Edwards,* 11 Vt. 587.

The affidavits of jurors are not admissible to impeach their verdict. *Newton* v. *Booth,* 13 Vt. 320; *Downer* v. *Baxter,* 30 Vt. 467; *Sheldon* v. *Perkins,* 37 Vt. 550; *Cutler* v. *Cutler,* 43 Vt. 60; *Tarbell* v. *Tarbell,* 60 Vt. 494; *Carpenter* v. *Willey,* 65 Vt. 177; *State* v. *Lawrence,* 70 Vt. 531.

If the jury did misunderstand the charge, and that could be shown, this would be no ground for granting a new trial. *Wheatley* v. *Waldo,* 36 Vt. 228; *Cutler* v. *Cutler,* 43 Vt. 462.

WATSON, J. This is an action of trover for the alleged conversion of a quantity of lumber. The plaintiff's evidence tended to show that the defendant took and sold about thirty thousand feet of two-inch hard wood planks which plaintiff claimed to own by purchase from R. B. Lang of Barton; and also to hold, as against the defendant, by virtue of his claimed possession thereof. The defendant, who was a deputy sheriff, denied that the plaintiff was either owner or possessor of the property. He admitted the taking and selling of the planks in question but claimed and his evidence tended to show, that they were previously conditionally sold to Lang by Taplin & Rowell, and that in payment therefor they took Lang's two lien notes each payable one day after date and duly recorded; that the lien notes covered all the two-inch hard wood planks shipped by Taplin & Rowell to Lang from October 7, 1903, to

November 20, 1903, inclusive, and that they covered no other or different two-inch hard wood planks; that said planks were piled in the Lang millyard in a certain large double pile, just west of the spur track, and in one other stack just south of and next to the double pile in the same row, and none of said lumber was piled in any other stack or pile; that shortly before January 20, 1904, Taplin & Rowell placed the two lien notes, then overdue and unpaid, in his hands, as deputy sheriff, and directed him to enforce them against the two-inch hard wood planks described in each; and that by virtue of said lien notes he took and sold the same two-inch hard wood planks described therein and none other, and applied the net proceeds thereof to the notes in proportion as the planks were covered by them respectively. The plaintiff's evidence tended to show that the defendant took, moved, and sold all the two-inch hard wood planks in the said double pile and the single pile directly south of and next to it, and also nearly all of another stack just south of the one last named and on the same side of the spur track; and that the planks which the defendant admitted that he took and sold were, in fact, delivered at the Lang millyard at an earlier date than October 7, 1903, and were largely planks which had been piled there as early as the first part of August, 1903, and were not covered by the lien notes. In connection with the general verdict for the plaintiff, the jury made a special finding that the hard wood planks which the defendant took and sold were not covered by the lien notes.

It appeared that prior to December 3, 1903, Lang was the owner of the millyard and premises known as the R. B. Lang mill property at South Barton. The lumber in controversy at the time it was moved away by the defendant, was located on these premises, piled or stacked in the millyard.

Subject to defendant's exception, and for the purpose of showing that at the time in question the possession of the millyard was in himself, the plaintiff introduced in evidence a contract, two leases, and a quitclaim deed. The contract was made and executed September 30, 1902, by and between Lang and the plaintiff. By its provisions, in consideration of advancements to be made by the plaintiff, Lang agreed to ship to the order of the plaintiff all the lumber cut out of the then coming season's stock of logs, that the plaintiff should do the exclusive marketing thereof and that Lang should manufacture and car the lumber according to plaintiff's directions. The plaintiff agreed to advance to Lang a certain sum of money per thousand feet when the logs were cut and piled on skids on the "Railroad Lots," a further sum when hauled to Lang's mill, a further sum when the logs were sawed and the lumber stuck up, and a further sum when the lumber was planed and loaded on the cars at South Barton. He also agreed to advance money to Lang on all other logs purchased by him, at different stages from the time when they should be delivered at Lang's mill to the loading of the lumber on the cars inclusive. It further stated "It is agreed and understood by the parties that all logs and the lumber manufactured therefrom, when delivered at or about the Lang mill shall become the sole and entire property of said Marcy and so remain until all advancements made by the said Marcy and the interest thereon are fully paid." The contract was to continue in force until the lumber from the then coming season's stock of logs should be disposed of according to its terms. On September 28, 1903, this contract by agreement in writing on the back, was extended to continue in force until all the lumber manufactured from "the past season's cut of logs, and from the logs to be hereafter cut on lots Nos. 130

and 131, (mentioned in a deed from R. B. Lang to Frank F. Marcy, dated Nov. 5, A. D. 1902) is fully marketed." The evidence showed that the lots referred to in the contract as "Railroad Lots" were owned by the plaintiff and that the logs cut thereon under the contract belonged to him. True, this written contract did not in itself refer to any of the lumber in dispute, but the plaintiff's evidence tended to show that by subsequent parol agreement it was made to cover all sawed lumber bought by Lang and delivered at the Lang millyard, which would include the lumber in question. Thus in re-examination the plaintiff testified respecting such sawed lumber as follows:

"Q. You may state the substance of what was said between you and Mr. Lang about that lumber that he should buy. Ans. At various times I was to pay for what lumber was delivered on my ground and put in my possession, and it was to be treated the same as the logs. Q. Same as the logs under the contract? Ans. Yes sir."

The leases were from Lang to the plaintiff, and of the Lang millyard where the lumber was piled, one dated October 1, 1903, and recorded on the 6th day of the same month, with term to October 1, 1903; the other dated September 28, 1903, and recorded the next day, term to begin at the expiration of the former lease and to continue one year. The defendant's counsel objected to the admission of the written contract and the two leases on the ground that they were immaterial. The quitclaim deed was from Lang to the plaintiff, dated and delivered December 3, 1903, and recorded the next day, conveying Lang's mill property at South Barton, including the millyard on which the lumber in dispute was located at the time it was taken by the defendant. Defendant objected to its admission on the ground that it also was immaterial, being

dated after the defendant's lien notes were executed and recorded. In the light of the parol evidence showing the situation of the parties, the subject-matter of these four documents, and the surrounding circumstances when they were respectively executed, there can be no doubt regarding their materiality. They were so connected with the lumber transaction between Lang and the plaintiff as to form a part of it. They constituted different steps therein, from the time when the plaintiff engaged to advance money to Lang on the logs cut on the plaintiff's lots, and on all other logs purchased by Lang at market price, and the lumber sawed, at different stages of the work, with an agreement that all logs and the lumber manufactured therefrom when delivered at the Lang mill should "become the sole and entire property of" the plaintiff and so remain until all advancements made by him should be fully paid, and a subsequent parol agreement that all other lumber furnished by Lang was to be treated the same as logs, to the time when, finding that Lang "was running things wrong," the plaintiff received the quitclaim deed and took possession of the property.

True the evidence showed that Lang was in the occupancy of the millyard during all the time covered by the terms of the two leases until he gave the quitclaim deed, yet the plaintiff's evidence tended to show that when he received the deed, he put men in charge of the mill and millyard and kept them in charge thereof until after the defendant took the lumber in dispute; and that soon after the plaintiff received the deed and before the lumber in question was taken away by the defendant, Lang ceased to work in or about the mill or millyard, left the premises, and ceased to exercise any control over the mill premises, or the property there, or the business there carried on. Especially is the materiality of this docu-

mentary evidence obvious if, as the plaintiff claims, the testimony tended to show that he took exclusive possession of all the lumber in the millyard on or about the day he received the quitclaim deed, and continued so in possession till after the lumber in controversy was taken. The defendant denies that the testimony tended to show that plaintiff took possession of the lumber in controversy beyond such constructive possession as the quitclaim deed and leases gave him, if any. We are referred to the transcript of the evidence to determine this question.

In addition to the evidence before referred to, the plaintiff testified, in substance, that what lumber Lang bought and delivered into the millyard into the plaintiff's possession, he, plaintiff, was to pay for and had done so; that Lang would write down to him that he, Lang, had so much lumber or logs and had done so much work, and the plaintiff would send him a check to pay for the lumber which he said was delivered in the yard; and that when he took the quitclaim deed, he took Lang's "interest in everything." That about the time he took the deed, he put Mr. Robinson in charge of his interests there, and also S. A. Hunt at different times. Hunt was produced as a witness by the plaintiff and testified in substance that he worked for the plaintiff from December 22, 1903, until July, 1904; that he was the plaintiff's foreman in charge of the property at the Lang mill; that he did the scaling of lumber in the millyard, took care of the lumber there and did the shipping; that within a few days after December 22, when he was first put in charge, he went through all the lumber in the millyard, including that taken by the defendant, and estimated it "to determine somewhere near what we had of different kinds." Robinson was called by the plaintiff and testified that he went to work there for the plaintiff December

4, 1903, and remained as foreman in charge inside until some time in March following; that he was there when the defendant took the lumber, and that he helped Hunt make estimates of the piles of planks in question before the defendant moved them. Bert Sheldon testified that he was bookkeeper for Lang until the plaintiff took possession, and after that he worked in the same capacity there for the plaintiff; and as we have before observed, the plaintiff's evidence tended to show that Lang went away soon after he gave the quitclaim deed, and had nothing to do with that property or business thereafter. Certainly this evidence tended to show that with the taking of the quitclaim deed the plaintiff took the actual possession of all the lumber in the millyard, and was thus in possession when the planks in dispute were moved away by the defendant.

A plan prepared by the plaintiff's witness Hunt, purporting to show four piles of lumber on the west side of the railroad siding running to the Lang mill, numbered 1, 2, 3, 4, from which plaintiff claimed defendant took lumber, and two piles on the mill platform numbered 5, and 6, was offered and received in evidence in connection with the testimony of the witness to explain and make clear what he was talking about with respect to what lumber was moved and where the lumber which was moved was situated before moving with respect to this siding. Before the plan was admitted the witness testified on cross-examination that between the piles 2 and 3 was a pile of white birch, and that about half its bigness further from the track on the same side "was another pile of hard wood, not a stack, but heaped up, piled up." That the plan shows with reasonable accuracy the situation of the piles marked thereon had previously been testified by the plaintiff. Defendant excepted to its admission because it did

not show these other piles and was misleading; that it was not a correct representation of the piles that were there at the time defendant took the planks sued for. The two piles of lumber which the evidence shows were not represented on the plan were not in controversy and could have no bearing on any issue before the jury. There was no dispute as to the location of the six piles represented thereon with reference to each other nor with reference to the spur track. The location of any other piles was wholly immaterial, and their representation on the plan could not have made the testimony of the witness any clearer to the jury. The plan was admitted for a particular purpose, and in the ruling there was no error. The case of *Hale* v. *Rich,* 48 Vt. 217, is full authority for this holding.

The plaintiff called B. C. Berry as a witness who testified that the defendant pointed out to him the stacks of lumber in the millyard, which he claimed he had taken, and placed them in charge of the witness as keeper; that there were one solid or double stack and five others, making six in all, if the double one is called two. After testifying on which side of the track the stacks were, the witness was shown the plan and asked to state if it represented the situation of the stacks that he was put in charge of. To this the defendant's counsel objected; but no exception was taken to its admission and the question is not before us. In re-examination the witness was asked when if ever he first noticed that pile 3 on the plan was moved. Defendant's counsel objected to the witness being allowed to testify by the number on the plan, and excepted to the allowance of the question. The witness answered that he didn't know as he could answer that correctly, that it was a matter which he never paid much attention to. We

need not consider this exception, since the answer was harmless.

At the close of the evidence the defendant moved for a verdict on the ground that (1) no title is shown in the plaintiff to any of the property which defendant took, removed, and sold; (2) there is no evidence that the plaintiff had rightfully any possession of the lumber which any of the testimony tends to show was taken possession of, or moved by the defendant; and (3) there is no evidence in the case tending to show or establish facts entitling plaintiff to recover. The motion was overruled, to which defendant excepted. As we have already seen, the evidence tended to show the actual possession of the lumber in question in the plaintiff at the time the defendant took it. The special finding of the jury that the lumber sold by the defendant was not covered by the lien notes shows that as to that lumber the defendant stood as a stranger. The motion was rightfully overruled, for a person having the actual possession of chattels has a sufficient title thereto to enable him to maintain trover against a stranger for their conversion. *Knapp & Worden* v. *Winchester,* 11 Vt. 351; *Potter* v. *Washburn,* 13 Vt. 558.

The court charged the jury, among other things, that "There is no controversy * * upon the testimony in the case but that before and at the time the lumber was thus taken from the millyard, the plaintiff was in full and actual possession of the millyard and of the lumber thus taken away. The testimony shows in substance that on the 3rd day of December last, the plaintiff took a quitclaim deed from Lang, and that deed on inspection seems to cover and it is conceded by counsel, as I understand, does cover the Lang mill and millyard and the appurtenances. I don't think there is anything in

that deed showing that any lumber in the millyard was conveyed by it. There is not. I have read it. The testimony further is that on the 4th day of December the plaintiff put men in charge of the mill and the yard, and the testimony further is that pretty soon and in the month of December, and before the lumber was taken away by the defendant, Lang moved away, went away, so that left the plaintiff in the full actual possession of the lumber in the yard." To this part of the charge the defendant excepted as follows: (1) That the plaintiff was in full and actual possession of the lumber in controversy, at the time it was taken by the defendant. (2) That the effect of the quitclaim deed and the possession of the land conveyed to the plaintiff, gave him the full and actual possession of the lumber in controversy.

Immediately after the above exceptions were taken, the plaintiff's counsel asked the defendant's counsel whether they claimed the right to go to the jury upon the question as to the truth of what the plaintiff says in respect to putting Hunt in charge, and what Hunt says in respect of being in charge, and what Robinson says in respect of being in charge of the property, the millyard there. To which the defendant's counsel replied, "We have no testimony on that subject." And further that "The legal effect of this testimony is not sufficient to give the plaintiff legal possession of the property."

We have already discussed the plaintiff's evidence showing the title and possession of the mill property, including the millyard, in the plaintiff under the quitclaim deed, and his possession of all the lumber in the millyard before and at the time the lumber in question was taken by the defendant, and further discussion of it is unnecessary. We think the legal effect of this evidence, undisputed, is as stated in the charge

above quoted, and that the exceptions thereto are without force.

The court further instructed the jury that there being no controversy but that the defendant did take away lumber there as indicated in the part of the charge above quoted, the burden was upon him to show that he had a right to take it, because by taking it he invaded the plaintiff's possession, and the possession that the plaintiff had was sufficient title as against the defendant unless he could show a better right than the possessory right of the plaintiff, to which the defendant excepted. But in this there was no error. Actual possession of personal property is enough, *prima facie,* to sustain an action of trover for its conversion against anyone except the true owner, or one connecting himself in some way with the true owner. In such circumstances in order to defeat a recovery the burden is on the defendant not only to show a better title in some other person but also his connection with such other person. *White* v. *Bascom,* 28 Vt. 268; *Wooley* v. *Edson,* 35 Vt. 214.

The defendant moved to set aside the verdict because (1) it is contrary to the evidence; (2) the uncontradicted evidence in the case shows that a portion of the planks which were taken by the defendant were the planks of Taplin & Rowell and were the same planks covered by the lien notes; (3) the evidence shows that a large part of the planks which defendant took were planks described in the lien notes of Taplin & Rowell, under which he was acting; and (4) the verdict is excessive and gives the plaintiff damages for taking more lumber than any testimony in the case tends to show that defendant did take, which belonged to plaintiff. The motion was overruled to which defendant excepted.

As we have before seen, the exceptions state that the defendant claimed and his evidence tended to prove that the lien notes before mentioned covered all the two-inch hard wood planks shipped by Taplin & Rowell to Lang from October 7, 1903, to November 20, 1903, inclusive, and that they covered no other or different hard wood planks; and also that the plaintiff's evidence tended to show that the planks which the defendant admitted he took and sold were, in fact, delivered at the Lang millyard, at an earlier date than October 7, 1903, and that they were largely planks that had been piled there as early as the first part of August of that year. Defendant's evidence further tended to show that Taplin & Rowell sold no two-inch hard wood planks to Lang except 10,834 feet sold conditionally July 1, 1903, and the planks sold between October 7, and November 20, inclusive, which were covered by the two lien notes, and that Lang bought no other two-inch hard wood planks of the same kind and quality from anyone else during the summer or fall of that year, and that he bought no two-inch maple, birch and beech planks of anyone in that year except from Taplin & Rowell. The plaintiff claimed that Taplin & Rowell did sell to Lang during that summer and fall more two-inch hard wood planks of the kind and quality in question than above stated; and that Lang must have received other two-inch hard wood planks of the same kind and quality of someone else during that summer and fall, and claimed that the evidence tended so to show. The defendant denied that the evidence had such a tendency, and we are referred to the official transcript of the evidence to determine it. We have examined the evidence as shown by the transcript and think its tendency bears out the claim of the plaintiff in this respect. The motion to set aside the verdict as far as it was based upon the claim that it was without evi-

dence, was therefore properly overruled. And to the extent that the motion is based upon the ground that it is against the weight of evidence, the action of the court below was discretionary and not revisable here.

This disposes of all the exceptions upon which the defendant relies as showing error, and *judgment is affirmed.*

The defendant has brought a petition for a new trial upon the ground that a part of the jury wholly misapprehended the effect of the charge and rendered a different verdict by reason thereof than they otherwise would. The petition is supported by the affidavits of five of the jurors who sat on the case, and by no other evidence. The law is well settled in this State that the affidavits of jurors who sat on a case will not be received to impeach or set aside their verdict; and that their affidavits to the effect that they misunderstood the law of the case, or the instructions of the court, come within this rule. *Sheldon* v. *Perkins,* 37 Vt. 550; *Carpenter* v. *Willey,* 65 Vt. 117; *Tarbell* v. *Tarbell,* 60 Vt. 486.

The petition is dismissed with costs.

WILLIAM A. FRENCH *v.* STILLMAN C. WHITE.

May Term, 1905.

Present: TYLER, MUNSON, START, WATSON, HASELTON, and POWERS, JJ.

Opinion filed October 25, 1905.

Pledge of Corporate Stock—How Made—Effect of Mere Delivery of Certificate—V. S. 3689—Bankruptcy—Trustee's Title—Suit by Attachment Only—Proceeding In Rem—Effect of Judgment—Bankruptcy—Bankrupt's Property in Custody of Bankruptcy Court—Attachment by State Court—Effect—Audita Querela.

At common law, the word "assignment," when used in reference to the pledging of corporate stock, means a written transfer.

To constitute a valid pledge of corporate stock, either at common law or under the requirements of V. S. 3689, besides the delivery of the certificate, there must be a written transfer sufficient to pass the title, and also a transfer on the books of the corporation, or power of attorney to make such transfer.

When the maker thereof executed and delivered to defendant two promissory notes, he merely "deposited" with defendant, as collateral security, certain certificates of the corporate stock of a corporation organized under the laws of this State, and later he was adjudged a bankrupt, under the Federal Bankruptcy Act, and plaintiff was appointed trustee in bankruptcy. *Held*, that, since there was no written transfer of the corporate stock, there was no pledge thereof, either at common law or under V. S. 3689, and so the question of notice to the corporation is immaterial; and that, under the provisions of said bankruptcy law, when plaintiff was appointed trustee the title to said stock vested in him as of the date of the commencement of said bankruptcy proceedings.

A suit against a non-resident of Vermont, instituted by merely attaching his property in this State, with no service of process upon the defendant, and no appearance by him, is, essentially, a proceeding *in rem*, the only effect of which can be to subject the property attached to the payment of the judgment obtained by the plaintiff;

and such judgment, however regularly obtained, is void as a personal judgment.

To give a court jurisdiction in a proceeding *in rem*, there must be a valid seizure and an actual control of the *res* under process therefrom.

Whenever property has been legally seized by an officer of a court, by virtue of its process, such property is in the custody and possession of that court for the time being; and no other court, unless it has superior jurisdiction in the premises, has a right to interfere with that custody and possession.

Property cannot be constructively, any more than actually, in two places at the same time.

Under the present Federal Bankruptcy Law, the filing of the petition is a *caveat* to all the world, and in effect an attachment and injunction; and when the petitioner is adjudged a bankrupt, the title to his property becomes vested in the trustee, with actual or constructive possession and placed in the custody of the court of bankruptcy; and it cannot be taken out of that custody by any process from a state court.

The defendant brought a suit in assumpsit in this State against a person who was then both a non-resident and in bankruptcy under the Federal Bankruptcy Law. Service was made by attachment only, with no service of process upon the bankrupt, and no appearance by him. Judgment by default was rendered in favor of the defendant,—the plaintiff therein—and execution issued. In *audita querela* by the trustee of said estate in bankruptcy to vacate said judgment and execution, *held*, that the state court had acquired no jurisdiction of the subject-matter of said suit in assumpsit; that the attempted attachment of said property and all subsequent proceedings in said suit are void; and that therefore there is no necessity for said action of *audita querela*.

AUDITA QUERELA by the trustee in bankruptcy of the bankrupt estate of Henry S. Mackay, to vacate a judgment, and execution issued thereon, rendered at the September Term, 1901, Washington County Court. Plea, the general issue. Trial by court at the September Term, 1904, Washington County, *Rowell,* J., presiding. Judgment that said judgment and execution be both set aside and held for nought,

and that the plaintiff recover his costs. The defendant excepted.

Geo. W. Wing, and *Gordon & Jackson* for the defendant.

A trustee cannot avail himself of *audita querela. Braynards* v. *Burpee,* 27 Vt. 616.

Attaching creditors cannot resort to *audita querela. Essex Mining Co.* v. *Bullard,* 43 Vt. 238. This action is personal. *Conn. & Pass. R. R.* v. *Bliss,* 24 Vt. 411.

Hunton & Stickney for the plaintiff.

The trustee has a right to attach the judgment against Mackay. *Conn. & Pass. River Co.* v. *Bliss,* 24 Vt. 411; *Gleason* v. *Peck,* 12 Vt. 56; *Onion* v. *Clark,* 18 Vt. 363; *Hammond, Assignee &c.* v. *Rice,* 18 Vt. 353; *Maris* v. *Duron,* 6 Pa. 327; *Ames* v. *Gilman,* 10 Met. 237; *Hemdon* v. *Howard,* 9 Wall. 664.

Upon an adjudication of bankruptcy, all the bankrupt's property passes to the trustee, who is an officer of the court of bankruptcy, and such property is thus in the custody of said court so that all creditors holding claims are affected by all its decrees. Collier, Bankruptcy, p. 15, 3rd ed.; *Markson* v. *Heaney,* 1 Dill. 497, Fed. Cas. 9098; 3 Chi. Leg. News, 153, 4 N. B. R. 510; *Paine* v. *Caldwell,* Fed. Cas. 10,674, N. B. R. 558; *Picquet* v. *Swan,* Fed. Cas. 11,134; 5 Mason 35; *Toland* v. *Sprague,* 12 Pet. 327; *Herndon* v. *Ridgeway,* 17 How. 424; *In Re Hirsch,* 2 N. B. R. 3, Fed. Cas. 6,529; 2 Ben. 493; *Jobbins* v. *Montague,* 6 N. B. R. 509, Fed. Cas. 7,330.

WATSON, J. On the 22d day of April, 1899, Henry S. Mackay was adjudged a bankrupt under the United States bankruptcy laws, before the District Court of the United

States, in the District of Massachusetts, and the plaintiff was appointed sole trustee of the bankrupt estate. At that time Mackay was the owner of two hundred twenty shares of the capital stock of the Vermont Granite Company, represented by two certificates issued to him, one numbered 25 for ninety shares and one numbered 26 for one hundred thirty shares. The Vermont Granite Company is a corporation organized under the laws of this State and has its principal office and place of business at the city of Barre. Mackay was the owner of this stock as early as in October, 1893, but how much earlier does not appear. After he became the owner of it, he gave to the defendant on the day of their date two promissory notes, one for $6,500 at one year's date with interest annually, and one for $4,500 at eight months' date, with like interest. At the time of the execution and delivery of these notes, Mackay "deposited" with the defendant the certificates of stock, the one for one hundred thirty shares as collateral security for the payment of the larger note, and the one for ninety shares as collateral security for the payment of the smaller note. The certificates were not assigned in writing nor otherwise than as above stated. Nor was any memorandum of transfer or deposit made on any books of the company. Neither Mackay nor the defendant ever gave, or procured to be given, any notice to the company that the certificates were so "deposited," but in October, 1893, the then treasurer and secretary of the company was incidentally told of it by a person who happened to know the fact. Stock in the company was and is transferable only on the books of the company by the holder or his attorney on the surrender of the certificate. The transfer of the certificates to the defendant was by delivery only. No assignment of them was made.

To render a transfer of shares of stock as collateral security valid against subsequent attaching creditors of the owner, under the statute, the transfer must be "by assignment and delivery," with notice to the clerk, cashier, or treasurer of the corporation, and a memorandum thereof made upon its stock ledger. V. S. 3689. Aside from the statute, without a written transfer of some kind sufficient to pass the legal title, with a transfer on the books of the corporation, or accompanied with power to make such a transfer, as well as a delivery of the certificate, there is no such delivery of the possession of the property as is essential to the validity of a pledge of corporate stock. Jones on Pledges, § 151, 152; See *Sampson* v. *Rouse*, 72 Vt. 422, 48 Atl. 666, and *White River Savings Bank* v. *Capital Savings Bank and Trust Co.* 77 Vt. 123. Thus under the well known rules of the common law, the word "assignment" used in connection with such pledges means a written transfer, and it must be understood in the statute above referred to in the same sense in which it is understood at common law. 9 Bac. Abr. (Bouvier ed.) 238.

Since there was no written transfer of the stock in question, there was no pledge either at common law or under the statute, and the question of notice to the corporation is immaterial. It follows that prior to the filing of the petition in the proceedings in bankruptcy the two hundred twenty shares of stock might have been levied upon and sold under judicial process against Mackay; and under the provisions of the bankrupt law, when the plaintiff was appointed trustee the title to this stock vested in him by relation at the date of the commencement of the proceedings. Bankruptcy Act of 1898, § 70; *In re Appel*, 103 Fed. 931, 4 Am. B. R. 722.

Some months after the title to the property was so vested in the trustee, the defendant sued out his writ of attachment

against the bankrupt returnable before the county court within and for the county of Washington in this State, therein commanding that the goods and chattels of the bankrupt be attached to the value of twenty thousand dollars. The action was general assumpsit and founded on the two promissory notes before described. The writ was in form served by attaching as the property of the bankrupt the said two hundred twenty shares of stock. The bankrupt was a non-resident of this State and at most was given only constructive notice of the suit and attachment. The trustee in bankruptcy was also a non-resident. Neither of them had any notice in fact or knowledge of the suit or any of the proceedings therein. An order for notice to the bankrupt by publication was made, but it is contended that the requirements of the statute in this respect were not complied with. In the view we take of the case before us, however, that question is immaterial and not further noticed. Judgment was rendered in the former case against the bankrupt by default for the sum of $17,698.12 and costs. Execution was issued, and the property attached was advertised for sale thereon. Pending the notice for sale the present suit was brought in the name of the trustee in bankruptcy to vacate the judgment and execution.

Since in that action there was no service of process upon the bankrupt and no appearance by him, the case was in its essential nature a proceeding *in rem* the only effect of which could be to subject the property attached to the payment of the debt found due to the plaintiff on which the action was founded. As a personal judgment, the judgment rendered was void. Indeed when regularly obtained, such a judgment is without any binding force except as to the property attached. *Woodruff* v. *Taylor,* 20 Vt. 65; *National Bank* v. *Peabody & Co.* 55 Vt. 492.

At the time of the commencement of the former case, could the property in question be attached by process from the state court? This is an important question and if held in the negative, one that is decisive of the present case. In *Mueller* v. *Nugent,* 184 U. S. 1, 46 L. ed. 405, the Court, speaking through Mr. Chief Justice Fuller, said: "It is as true of the present law as it was of that of 1867, that the filing of the petition is a *caveat* to all the world, and in effect an attachment and injunction (*Internation Bank* v. *Sherman,* 101 U. S. 407, 25 L. ed. 867), and on adjudication title to the bankrupt's property became vested in the trustee (Sec. 70, 21c) with actual or constructive possession, and placed in the custody of the bankruptcy court."

Since the stock in question, as a part of the bankrupt estate was in the custody of the Federal Court, it could not be taken out of that custody by any process from a state court. Property cannot be constructively, any more than actually, in two places at the same time. To give a court jurisdiction in a proceeding *in rem,* there must be a valid seizure and an actual control of the *res* under the process therefrom. The attempt to seize the property by attachment was a nullity and gave the state court no jurisdiction over it. In *Stoughton* v. *Mott,* 13 Vt. 175, the action was trespass for taking and carrying away the plaintiff's sloop, and a quantity of military stores, arms, &c. After a trial was had on the general issue resulting in a verdict for the plaintiff, the suit was dismissed on defendant's motion for want of jurisdiction, and on exception thereto, the case was heard in this Court. It appeared that the defendant, an officer of the United States, seized and was holding the sloop and arms and munitions of war under an Act of Congress, as intended to be employed by the owners thereof in carrying on military operations within the Province of

Lower Canada, a country with which the United States was at peace. Royce, J., delivered the opinion of the Court: "If the action is of a character which necessarily goes to devest the possession, under the seizure, it cannot be sustained. Such was the case of *Slocum* v. *Mayberry,* (2 Wheat.) being replevin, which could not be instituted to effect, without retaking the property from the seizing officer. But if the action is an ordinary one, seeking merely to recover damages, there would seem to be nothing in principle to forbid the pendency of both suits at the same time." The doctrine there laid down is a principle thoroughly established in law. In *Buck* v. *Colbath,* 3 Wall. 334, 18 L. ed. 257, the Court, speaking through Mr. Justice Miller, said it is "a principle which is essential to the dignity and just authority of every court, and to the comity which should regulate the relations between all courts of concurrent jurisdiction. That principle is, that whenever property has been seized by an officer of the court, by virtue of its process, the property is to be considered as in the custody of the court and under its control for the time being; and that no other court has a right to interfere with that possession, unless it be some court which may have a direct supervisory control over the court whose process has first taken possession, or some superior jurisdiction in the premises." See also *Taylor* v. *Carryl,* 20 How. 583, 15 L. ed. 1028; *Covell* v. *Heyman,* 111 U. S. 176, 28 L. ed. 390; *White* v. *Schloerb,* 178 U. S. 542, 44 L. ed. 1183.

It follows that the state court acquired no jurisdiction of the *res* in the former case and that the attempted attachment of the property and all subsequent proceedings in that action are void. This being so, the property is not affected thereby, and there is no necessity for this action of *audita querela* to vacate the judgment and execution.

The question whether such an action can be maintained in the name of a trustee in bankruptcy in any circumstances where the judgment sought to be vacated was rendered against the bankrupt, is not considered.

Judgment reversed and judgment for defendant to recover his costs.

STATE *v.* EDDIE BARR AND FRANK PIANFETTI.

May Term, 1905.

Present: ROWELL, C. J., MUNSON, START, WATSON, HASELTON, and POWERS, JJ.

Opinion filed October 25, 1905.

Criminal Law—Intoxicating Liquor—Information — Distinct Offences—Election—Evidence—Constitutional Law—Motion in Arrest.

In a prosecution under an information in six counts charging the unlawful selling and furnishing of intoxicating liquor, it was not error to allow the State, after having introduced evidence tending to show six offences of selling, to introduce evidence of other sales.

But it was error for the court to refuse, at the close of all the evidence, to require the State to elect the occasions on which it would rely for a conviction under the six counts for selling, and to allow the case to go to the jury on all the evidence of sales, although it ruled that there could be a conviction of only six offences, and charged that each offence must be found on evidence particularly relating to it.

In a prosecution for unlawfully selling intoxicating liquor, it was proper to allow officers to testify as to what they saw on the respondent's premises while illegally searching there for intoxicating liquor.

After verdict, in a prosecution for selling intoxicating liquor without a license, in violation of No. 90, Acts 1902, the sale found must be taken to be unlawful, as against the objection made on motion in arrest of judgment, that the words "intoxicating liquor," used in the information, include cider and wine which, in certain circumstances, may be lawfully sold without a license.

Nor can the respondents, on such motion in arrest of judgment, avail themselves of the objection that said act contains unconstitutional discriminations in respect of cider and wine; for as it does not appear that they were convicted of selling either cider or wine, it does not appear that they were affected in any way by the alleged discriminations.

INFORMATION for selling and furnishing intoxicating liquor without a license, in violation of No. 90, Acts 1902, with two counts for "keeping and exposing for sale." Trial by jury at the December Term, 1904, Caledonia County, *Tyler*, J., presiding. Plea, not guilty. Verdict, "guilty of one joint offence;" judgment thereon. The respondents excepted.

Subject to respondent's objection and exception certain police officers of the village of Hardwick were allowed to testify that in the spring of 1904 they made searches of respondent's premises under warrants authorizing them to search for intoxicating liquor; that while making these searches they saw a sink with a faucet over it, back of the counter in the rear of respondent's store, and that on the occasions of the several searches the water was found running from the faucet into said sink. The search warrants were not produced.

Taylor & Dutton for the respondents.

The State should have been required to elect what offences it relied upon. *State* v. *Smith*, 22 Vt. 74; *State* v. *Smalley*, 50 Vt. 749; *State* v. *Lockwood*, 58 Vt. 378; *Com.*

v. *O'Hanlon,* 155 Mass. 198; *Scott* v. *The State,* (Tex. 1904) 81 S. W. 950; *Powell* v. *The State,* (Tex. 1904) 82 S. W. 516; *Smith* v. *Com.,* 109 Ky. 685; *Com.* v. *Illinois Cent. R. Co.,* 82 S. W. 381; *Brown* v. *The State,* (Tex. 1904) 83 S. W. 378; *State* v. *Moore,* 2 Penn., (Del.) 299-320.

The warrants with the return thereon were the only proper evidence of the police officers' right to search respondents' premises. The several searches were unlawful, and no evidence could be given of what the officers found on the premises, because that would be compelling the respondents to furnish evidence against themselves. Constitution of Vermont, Chap. 1, Art. 10; *State* v. *Salmon,* 73 Vt. 212; *Newberry* v. *Carpenter,* 107 Mich. 567, 61 St. Rep. 346; *State* v. *Davis,* 32 St. Rep. 643; *State* v. *Height,* (Ia. 1902) 59 L. R. A. 438.

Frank D. Thompson, State's Attorney, and *David E. Porter* for the State.

The evidence of the officers as to what they saw on the respondents' premises, while making searches in the spring of 1904, was properly admitted. *Adams* v. *New York,* 192 U. S. 585; *State* v. *Flynn,* 36 N. H. 64.

In an information for selling intoxicating liquor, it is not necessary to specify the kind of liquor sold, nor the person to whom the liquor was sold. *State* v. *Munger,* 15 Vt. 290; *State* v. *Reynolds,* 47 Vt. 297; *State* v. *Hodgson,* 66 Vt. 134.

If the intoxicating liquor which respondents sold or furnished was wine or cider, and they sold or furnished it lawfully, this was matter of defence, and need not be negatived in the information. *Com.* v. *Hart,* 11 Cush. 130; *State* v. *Abbey,* 29 Vt. 60; *State* v. *Butler,* 17 Vt. 145; *State* v.

Barker, 18 Vt. 195; *State* v. *Norton,* 45 Vt. 258; *State* v. *Freeman,* 27 Vt. 523.

ROWELL, C. J. This is an information under the license act of 1902. Six counts are for selling and furnishing intoxicating liquor without a license; and two, for keeping and exposing for sale without a license.

It was not error to allow the State, after having introduced evidence tending to show six offences of selling, to introduce evidence of other sales. This precise question was so ruled in *State* v. *Smith,* 22 Vt. 74, and in *State* v. *Croteau,* 23 Vt. 14.

But as each sale was a separate offence, it was error for the court to refuse at the close of the testimony to require the State to elect the occasions on which it would rely for conviction under the counts for selling, and to allow the case to go to the jury on all the evidence of sales, although it ruled that there could be a conviction of no more offences than there were counts, and charged that each offence must be found on evidence particularly relating to it. Although that was a question of practice, addressed to the discretion of the court, still that discretion was to be exercised within the bounds of the law, which are pretty well defined in such cases. *Hubbard* v. *Hubbard,* 77 Vt. at p. 77. The object of an election being, whether of counts or offences, to save the prisoner from embarrassment in his defence, the cases say that as a rule it should be made before the prisoner is called upon to put in his evidence. Thus, in *State* v. *Smith,* 22 Vt. 74, this Court said there is much good sense in what Alderson, J., said in Wrigglesworth's case, that the election ought to be made, not merely before the case goes to the jury, but before the prisoner is called upon for his defence, and approved of that as satisfactory. *State* v. *Willett,* 78 Vt. 157.

The special circumstances of a case may make it proper to defer election till the testimony is all in. *Pointer* v. *United States*, 151 U. S. 396. But then it should be made before summing up. *Woodford* v. *People*, 62 N. Y., at p. 131.

In a prosecution for rape where several acts of intercourse were proved, the State was allowed to go to the jury on all of them, and held error, for each act being a separate offence, the State should have been put to elect which it would rely upon. *Powell* v. *State*, Texas Crim. App., Oct. 1904, 82 S. W. Rep. 516.

It is held in Kentucky that where several separate offences are proved, though the indictment is general, the State must elect, and cannot submit them all to the jury. *Commonwealth* v. *Illinois Central R. R. Co.*, Court of App., Oct. 1904, 82 S. W. Rep. 381. In *Smith* v. *Commonwealth*, 109 Ky. 685, that Court said that the State should not be allowed to prove a number of separate offences beyond what are charged, and submit them all to the jury, to catch the prisoner in a dragnet of offences.

It is contended that the several searches of the respondent's premises were illegal, and that therefore it was error to allow the officers to testify to what they saw there while making them, as that was compelling the respondents to furnish evidence against themselves. But this question was ruled the other way in *State* v. *Krinski*, 78 Vt. 172. The same thing is held in *Commonwealth* v. *Hurley*, 158 Mass. 159.

Under the motion in arrest, it is urged that as cider and wine are included in the words, "intoxicating liquor," as used in the information, which could be lawfully sold in some circumstances without a license, the information should have negatived those circumstances, or have specified the kind of liquor sold. But after verdict, the sale found must be taken

to have been unlawful, for the presumption is in favor of the legal correctness of the verdict, the contrary not appearing.

It is further urged under the motion, that said act is unconstitutional as interfering with interstate commerce, and as being in derogation of the Fourteenth Amendment of the Federal Constitution, in that it in terms discriminates in favor of cider and wine manufactured in this State, and unreasonably discriminates between sales of cider by the barrel and sales in lesser quantities. But as it does not appear that the respondents were convicted of selling either cider or wine, it does not appear that they were in any way affected by those discriminations if they existed, and therefore they cannot be heard to contest the constitutionality of the act on that ground. *State* v. *Scampini*, 77 Vt. 92.

Judgment and sentence reversed, verdict set aside, and cause remanded for a new trial.

STATE *v.* GISCOMO BARDELLI.

May Term, 1905.

Present: ROWELL, C. J., MUNSON, START, WATSON, HASELTON, and POWERS, JJ.

Opinion filed October 25, 1905.

Hostile Witnesses—Declarations Showing Hostility—Necessity of Laying Foundation.

When the hostility of a witness to the party against whom he is called is sought to be shown by oral statements of the witness out of court, it is not error to require a foundation to be laid by inquiring of him on the stand, with particularity of time, place, and occasion.

INFORMATION in six counts for selling and furnishing intoxicating liquor without a license, in violation of No. 90, Acts 1902, with two counts for "keeping and exposing for sale." Plea, the general issue. Trial by jury at the December Term, 1904, Caledonia County, *Tyler*, J., presiding. Verdict, "guilty of one offence of selling." Judgment thereon. The respondent excepted. The State's evidence did not tend to show more than six offences of selling or furnishing.

The exceptions do not state whether a foundation for the admission of the hostile statements referred to in the opinion was laid or required to be laid. In respect of this exception, the bill of exceptions states only that certain specified persons were witnesses for the State; that the respondent, as part of his defence, offered to show that those witnesses made out of court certain specified statements of hostility to him; that this offer was excluded, to which respondent excepted.

Taylor & Dutton for the respondent.

It was error to exclude respondent's offer that the witnesses for the State had made the specified hostile statements out of court. *Pierce* v. *Gilson*, 9 Vt. 222; *Hutchinson* v. *Wheeler*, 35 Vt. 340; *Ellsworth* v. *Potter*, 41 Vt. 689; 1 Greenl. Ev. § 123.

Frank D. Thompson, State's Attorney, and *David E. Porter* for the State.

The court properly excluded respondent's offer to show statements of hostility made out of court by State's witnesses. The only effect of such evidence would have been to impeach the witnesses, and no foundation was laid for its admission. *State* v. *Glynn*, 51 Vt. 577; *Stone* v. *Tupper*, 58 Vt. 409.

ROWELL, C. J. While it is always competent to show that a witness is hostile to a party against whom he is called, yet if that hostility is sought to be shown by his oral statements out of court, as it was here, it is not error to require a foundation to be laid by inquiring of the witness on the stand, with particularity of time, place, and occasion, whether he made the statements or not. *State v. Glynn,* 51 Vt. 577. It not appearing that such foundation was laid, no error is shown.

The court sufficiently charged that each offence must be found on the evidence that particularly related to it.

The other questions are like some of those in *State* v. *Barr* and *Pianfetti,* ante. p. 97, and are decided against the respondent.

Judgment that there is no error, and that the respondent take nothing by his exceptions. Let execution be done.

FRED CARTY'S ADMR. *v.* VILLAGE OF WINOOSKI.

May Term, 1905.

Present: ROWELL, C. J., TYLER, MUNSON, START, WATSON, and HASELTON, JJ.

Opinion filed October 25, 1905.

Police Power—Municipal Corporations—Responsibility for Negligence—Maintaining Lockup—Death by Wrongful Act—Survival of Action—V. S. 2451, 2452.

The police power is a governmental function inherent in every sovereignty, and founded upon the duty of the state to protect the public safety, the public health, and the public morals; and, in the

absence of constitutional restriction, this power may be delegated by a state to municipal corporations, to be exercised by them within their corporate limits.

The maintaining of a lockup by a municipality, under the provisions of V. S. 5302-5304, is but the exercising of a delegated portion of this police power, and all acts done by the municipality within this delegated power are governmental in character, and, therefore, it is not liable at common law for negligence therein.

Since the intestate, if death had not ensued, would have had no right of action for defendant's negligence, his personal representative can have none, under V. S. 2451-2452, for the benefit of next of kin.

CASE for negligence, brought by an administrator for the benefit of next of kin, under V. S. 2451-2452. Heard on demurrer to the declaration at the September Term, 1904, Chittenden County, *Powers,* J., presiding. Demurrer sustained, and declaration adjudged insufficient. The plaintiff excepted.

J. J. Enright, and *R. E. Brown* for the plaintiff.

The statute does not impose upon the defendant the duty of maintaining a lockup, but only grants it the right to do so, if it desires. Having freely chosen to maintain a lockup the defendant is liable for negligence, and the doctrine of *respondeat superior* applies. *Welsh* v. *Rutland,* 56 Vt. 228; *Weller* v. *Burlington,* 60 Vt. 28; *Shields* v. *Durham,* 36 L. R. A. 293; *Long* v. *Elberton,* 46 L. R. A. 428.

Henry Conlin, H. F. Wolcott, and *H. N. Deavitt* for the defendant.

The negligence charged is in respect of a governmental act, hence the demurrer should be sustained. *Stockwell* v. *Rutland,* 75 Vt. 76; *Moody* v. *Bristol,* 71 Vt. 472; *Aitkin* v. *Wells River,* 70 Vt. 308; *Saxe* v. *Burlington,* 70 Vt. 449; *Daniels* v. *Hathaway,* 65 Vt. 247; *Bates* v. *Rutland,* 62 Vt.

178; *Welsh* v. *Rutland*, 56 Vt. 228; *Blake* v. *Pontiac*, 49 Ill. 543; *Gulickson* v. *McDonald*, 62 Minn. 278; *Eddy* v. *Ellicottesville*, 35 N. Y. 256; *Kelly* v. *Cook*, 21 R. I. 29; *Brown* v. *Guyandotte*, 34 W. Va. 299; *Doster* v. *Atlanta*, 72 Ga. 233; *LaClef* v. *Concordia*, 41 Kan. 323; *Gray* v. *Mayor, etc., of Griffin*, 111 Ga. 361; *President &c.* v. *Schroeder*, 58 Ill. 353; *Western College* v. *Cleveland*, 12 Ohio St. 375; *New Kiowa* v. *Cram*, 46 Kan. 114; *Pfeffule* v. *Comrs. of Lyon Co.*, 39 Kan. 432; *Gould* v. *Topeka*, 32 Kan. 485; *Washington* v. *Gregson*, 31 Kan. 99; *Bigelow* v. *Randolph*, 13 Gray 541; *Finch* v. *Board*, 30 Ohio St. 37; *Flori* v. *St. Louis*, 69 Mo. 341; *Springfield Ins. Co.* v. *Keesville*, 148 N. Y. 46; *Edgerly* v. *Concord*, 62 N. H. 8; *Tainter* v. *Worcester*, 123 Mass. 311; *Eastman* v. *Meredith*, 36 N. H. 284; *Hughes* v. *Monroe Co.*, 147 N. Y. 49; Smith, Mun. Corp. § 781; *Bartlett* v. *Clarksburg*, 31 S. E. 918; *Chope* v. *Eureka*, 78 Cal. 588; *Trantor* v. *Sacramento*, 61 Cal. 271; *Parks* v. *Greenville*, 44 S. C. 168; *Hafford* v. *New Bedford*, 16 Gray 297; *Wheeler* v. *Cincinnati*, 19 Ohio St. 19; *Maxmillian* v. *Mayor, &c.*, 62 N. Y. 160; *Hart* v. *Bridgport*, 13 Blatch. 289; *Brown* v. *Vinalhaven*, 65 Me. 402; *Mead* v. *New Haven*, 40 Conn. 72; *Ham* v. *Mayor*, 70 N. Y. 459; *Howard* v. *San Francisco*, 51 Cal. 52; *Fisher* v. *Boston*, 104 Mass. 87; *McKenna* v. *St. Louis*, 5 Mo. App. 320; *Woolbridge* v. *Mayor*, 49 How. 67; *Hayes* v. *Oshkosh*, 32 Wis. 314; *Jewett* v. *New Haven*, 38 Conn. 368; *Wild* v. *Patterson*, 47 N. J. L. 406; *Wixon* v. *Newport*, 13 R. I. 454; *Murtaugh* v. *St. Louis*, 44 Mo. 479; *Bethune* v. *Phila.*, 196 Pa. 302, 46 Atl. 448; *Hill* v. *Boston*, 122 Mass. 344; *Urgubad* v. *Ogdensburg*, 91 N. Y. 67; *Ogg* v. *Lansing*, 35 Iowa 495.

The negligent exercise of a police power does not render a municipality liable. *Little* v. *Madison*, 49 Wis. 607; *Shults*

v. *Milwaukee,* 49 Wis. 254; *McElroy* v. *Albany,* 65 Ga. 387; *Elliott* v. *Phila.,* 75 Pa. St. 347; *Smith* v. *Rochester,* 76 N. Y. 506; *Pollock* v. *Louisville,* 13 Bush. 226; *Walcott* v. *Swampscott,* 1 Allen 101; *Brafham* v. *Supervisors,* 54 Miss. 363; *Williams, Municipal Liability,* § 38; *Walton* v. *Kemper,* 55 Ill. 346; *Lafayette* v. *Timberlake,* 88 Ind. 330; *Norristown* v. *Fitzpatrick,* 94 Pa. St. 121; *Winbugler* v. *Los Angeles,* 45 Cal. 36.

WATSON, J. This case is here on exception to the holding on demurrer that the declaration is insufficient. The demurrer is both general and special, but the declaration will be considered with reference to substance, only.

It is alleged therein that the defendant is a municipal corporation organized and existing under a charter granted by the Legislature, and carrying on and administering its municipal affairs through a board of trustees; and that pursuant to a lawful vote of the village, its trustees constructed, furnished, and maintained at the expense of the village the lockup in question for proper and lawful use in the detention, safe keeping and custody of such persons as might by proper authority and legal right be thereto committed. It is further alleged that the plaintiff's intestate was found in such a state of intoxication in the defendant village that he was greatly disturbing the public peace and tranquillity, whereupon he was arrested by a police officer of the village in the lawful and proper performance of his duties, and to restrain the intestate in custody for the purpose provided by law the officer committed him to the lockup as he well and lawfully might.

Other allegations show that in the construction, furnishing, and maintenance of the lockup the defendant and its trustees were guilty of negligence; that a mattress in the

lockup became and was ignited from some cause unknown, and without the fault of the intestate, producing "in said small, close, and unventilated lockup and cell a great volume of heavy smoke," etc., by reason whereof the intestate was "helplessly overcome, smothered, suffocated and killed."

A town or incorporated village in this State may by vote authorize its selectmen if a town, or trustees or bailiffs if a village, to erect and maintain at the expense of the town or village within its corporate limits one or more lockups or jails, and appoint a jailer who shall perform the duties and be subject to the same penalties imposed on county jailers and receive the same fees. V. S. 5302-5304. And "when process is delivered to an officer to serve, requiring him to commit a person to jail to await an examination or trial before a justice, or for neglect or refusal to make disclosure under the law prohibiting the traffic in intoxicating liquor, if such order for commitment was made within the limits of a town or an incorporated village maintaining a lockup or jail, such person shall be committed to such lockup or jail and be subject to the restraints and entitled to the privileges provided by law for persons confined in the county jail." V. S. 5305.

One of the powers of government inherent in every sovereignty is the governing and regulating of its internal police. Thus the police power, so called, rests at common law, and in this State also by reservation in the constitution. Ch. 1, § 5. In the absence of constitutional restrictions, this power may be delegated by a state to municipal corporations to be exercised within their corporate limits; but whether the power be so delegated or otherwise, it is a governmental function founded upon the duty of the state to protect the public safety, the public health, and the public morals. *Thorpe* v. *Rutland, Etc. R. Co.*, 27 Vt. 140, 62 Am. Dec. 625; *Lake*

Shore, Etc., R. Co. v. *Smith,* 173 U. S. 684, 43 L. ed. 858; License Cases, 5 How. 504, 12 L. ed. 256.

Since laws for the preservation of the public peace, quiet, and good order are within the police power it must follow that when for the purpose of enforcing such laws a municipality lawfully constructs, furnishes, and maintains a lockup or jail wherein to confine persons under arrest and awaiting an examination or trial, or for neglect or refusal to make disclosure under the law prohibiting the traffic in intoxicating liquor, it is but the exercising of the same power, for the whole includes all its parts. But as acts done within this power are governmental in character the municipality performing them is not liable at common law for negligence therein. The cases of *Welsh* v. *Village of Rutland,* 56 Vt. 228, and *Aitkin* v. *Village of Wells River,* 70 Vt. 308, 40 Atl. 829, were determined upon the same underlying principle and are decisive of the one before us. Cases very like this one have been before the courts in other states, and in the absence of statutes creating a liability they have been decided in the same way. *Gray* v. *Griffin,* 111 Ga. 361; *Gullickson* v. *McDonald,* 62 Minn. 278; *Davis* v. *Knoxville,* 90 Tenn. 599; *Lindley* v. *Polk County,* 84 Iowa, 308; *Brown's Admr.* v. *Guyandotte,* 34 W. Va. 299; *White* v. *Commissioners,* 129 Ind. 396; *LaClef* v. *City of Concordia,* 41 Kansas 323; 13 Am. St. Rep. 285; *Kelly* v. *Cook,* 21 R. I. 29; *Blake* v. *City of Pontiac,* 49 Ill. App. 543.

As the intestate would have had no right of action, if death had not ensued, his personal representative can have none for the benefit of next of kin. V. S. 2451-2452; *Lazelle* v. *Town of Newfane,* 70 Vt. 440, 41 Atl. 511.

Judgment affirmed, declaration adjudged insufficient, and judgment for the defendant to recover its costs.

BURTON J. GIBSON v. A. G. HOLMES AND P. H. PHARNEUF.

May Term, 1905.

Present: ROWELL, C. J., MUNSON, START, WATSON, HASELTON, and POWERS, JJ.

Opinion filed October 25, 1905.

False Imprisonment—Illegal Arrest—Imprisonment on Mesne Process—Officer's Return — Requisites — Justification — Amendment of Return—Jurisdiction of Justice after Return Day—Trespasser Ab Initio—Nonfeasance—Evidence —Docket Entries—Attorney and Client—Client's Responsibility for Attorney's Acts.

Docket entries are no record, but only minutes from which to make a record; hence a certified copy of another court's docket entries are not admissible to prove any act of that court.

In trespass for an illegal arrest, plaintiff's testimony, that he filed his petition in bankruptcy before his arrest, does not show that he was then in bankruptcy; for it does not show with sufficient certainty when he filed his petition, and the presumption of continuance cannot be invoked, for want of sufficient data.

When the authority of an officer is special in respect of imprisoning a man whom he has arrested on *mesne* process in a civil action, he must imprison accordingly, and if he imprisons elsewhere or otherwise, he is a trespasser.

Although, at common law, when an officer arrested a man on *mesne* process in a civil action, he might make any place his prison, for the command of the writ gave him a general authority in this respect, yet V. S. 1701, 1703 has changed the common law in respect of this general authority and makes the authority special in such cases, notwithstanding the command of the writ remains the same.

When a person commits his claim against another to an attorney for suit, he thereby invests the attorney, as his agent, with large discretion and most ample authority in everything pertaining to the collection of the claim and the control and service of process; and for all acts of the attorney within the scope of this authority the

client is responsible, regardless of whether they are warranted by the law.

In an action for false imprisonment, it appeared that, in a county where there then was a legal jail, plaintiff was arrested by an officer on *mesne* process returnable before a justice of the peace and sued out by an attorney on a debt placed in his hands by a client for suit; that the officer, by direction of the attorney given pursuant to an understanding with the client, took plaintiff into another county and there lodged him in jail, where he remained about an hour, when he was released. *Held*, that if plaintiff was thus imprisoned without his consent, both the officer and the client were trespassers and jointly responsible.

It was the plaintiff's right to be committed in the county where he was arrested, and it was the officer's duty to commit him there, in default of exposing property or procuring bail.

By so committing, the officer does not put it out of his power to obey his precept by having the defendant in that action before the justice at the time and place of trial; and, although if the officer took him out of jail for production in court, he would be unable to recommit him on the original writ—that having been returned into court—yet the authority inheres in the court to order him recommitted for want of bail.

Whitcomb v. *Cook*, 38 Vt. 477, and *Kenerson* v. *Bacon*, 41 Vt. 573 distinguished; and Durant's case, 60 Vt. 176 disapproved, *sub modo*.

When the plaintiff herein was released from arrest and imprisonment, the suit in which he was arrested was abandoned by the plaintiff therein, and the justice was not present at the time and place of trial, nor was the case continued. *Held*, that the jurisdiction of the justice lapsed, and that he had no authority six months afterwards to allow the officer to amend his return on the writ.

To make "return according to law" is not only to return the precept to the authority that issued it, but also to return with it a statement by the officer of his doings in executing it, and that statement must recite substantially all of his doings within the scope of the proper execution of the process, and must show that he has faithfully obeyed every lawful command of the process and of the statute, otherwise the return will be "undue," and insufficient for his protection.

The return of an officer on a justice writ issued as a capias: "I served this writ by arresting the body of the within named defendant,

Burt Gibson read the same in his hearing and this my return endorsed hereon," is insufficient, because it does not show how the defendant was disposed of after the arrest.

The officer's neglect to make a proper return is not a mere nonfeasance, any more than his neglect to return at all would be, in which case he would unquestionably be a trespasser *ab initio*.

Instead of saying that the want of a return, or an insufficient return, makes the officer a trespasser *ab initio*, it would be more accurate to say that a sufficient return is necessary to make the taking or arrest lawful *ab initio*.

Although the plaintiff in an action may not be responsible for the neglect of the officer who served the writ to make a sufficient return thereof, yet, if he abandons his suit before it is entered in court, he cannot justify under the writ.

TRESPASS for false imprisonment. Plea, the general issue, with notice of justification under process. Trial by jury at the March Term, 1903, Franklin County, *Tyler*, J., presiding. At the close of all the evidence the court ordered a verdict for the defendants. Judgment on verdict. The plaintiff excepted.

The writ upon which the plaintiff was arrested was returnable before a justice of the peace at Richford, Vt. The opinion fully states the case.

C. G. Austin & Sons, and *Alfred A. Hall* for the plaintiff.

The defendant should have committed the plaintiff at Newport. By committing plaintiff to the jail in St. Albans, defendant became a trespasser *ab initio* and cannot justify under the writ. *Lamb* v. *Day*, 8 Vt. 407; *Pierson* v. *Gale*, 8 Vt. 509; *Bond* v. *Wilder*, 16 Vt. 393; *Nelson* v. *Dennison*, 17 Vt. 73; *Abbott* v. *Kimball*, 19 Vt. 551; *Hall* v. *Ray*, 40 V. 576; *Kenerson* v. *Bacon*, 41 Vt. 573; *Hathaway* v. *Rice*,

19 Vt. 102; *Hooker* v. *Smith et al.*, 19 Vt. 151; *Vaughn* v. *Congdon*, 56 Vt. 111; *Carleton* v. *Taylor*, 50 Vt. 220.

At the time of his arrest plaintiff was in bankruptcy, and so privileged from arrest for any provable debt. Collier Bank, 91-95; *Deyo* v. *Van Valkenburg*, 5 Hill 242.

Hogan & Hogan, and *G. F. Ladd* for the defendants.

If the plaintiff was in bankruptcy at the time of his arrest, the justice was not thereby deprived of jurisdiction. *Brandon Co.* v. *Frazier*, 47 Vt. 88; *Boynton* v. *Ball*, 121 U. S. 457; *Rosenthal* v. *Nove*, 78 Am. St. Rep. 512; *Peck* v. *Jenness*, 43 Am. Dec. 573.

If the plaintiff was privileged from arrest because of his bankruptcy, this privilege was personal and could be waived. *Fletcher* v. *Baxter*, 2 Aik. 224; *Wood* v. *Kinsman*, 5 Vt. 588; V. S. 1735; *Petrie* v. *Fitzgerald*, 1 Daly (N. Y.) 401; 3 Cyc. 924.

Plaintiff's unsupported statement to the officer that he was in bankruptcy at the time of the arrest would not justify the officer in releasing plaintiff. *Pierson* v. *Gale*, 8 Vt. 511; *Gage* v. *Barnes*, 11 Vt. 195; *Churchill* v. *Churchill*, 12 Vt. 66; *Tarleton* v. *Fisher*, 2 Doug. 671; *Wilmarth* v. *Burt*, 7 Met. 257; *O'Shaughnessy* v. *Baxter*, 121 Mass. 515; 17 Fed. Cas. No. 9, 537; Collier, Bank., 5 Ed. pp. 601-12-13.

Since the writ upon which plaintiff was arrested issued from a court having apparent jurisdiction, and was regular on its face, trespass for false imprisonment cannot be maintained against either of the defendants. *Fletcher* v. *Baxter*, 2 Aik. 224; *Pierson* v. *Gale*, 8 Vt. 509; *Gage* v. *Barnes*, 11 Vt. 195; *Churchill* v. *Churchill*, 12 Vt. 66; *Marshall* v. *Town*, 28 Vt. 17; *Tarleton* v. *Fisher*, 2 Doug. 671; *Cameron* v. *Lightfoot*, 2 W. Bl. 1190; *Emery* v. *Hapgood*, 73 Mass.

55; *Wilmarth* v. *Burt*, 7 Met. 257; *Cassier* v. *Fales*, 139 Mass. 461; *Carle* v. *Delesdernier*, 29 Am. Dec. 508; Roberts' Digest, p. 489, § 30; Cooley's Const. Lim. 1 Ed. 398; *Wood* v. *Davis*, 34 N. H. 328; *Savacool* v. *Boughton*, 21 Am. Dec. 181; *Whitcomb* v. *Cook*, 38 Vt. 477; *Kenerson* v. *Bacon*, 41 Vt. 573; *Durant's Case*, 60 Vt. 176; *Kent* v. *Miles*, 68 Vt. 48; *Kent* v. *Miles*, 69 Vt., 379.

The justice had authority to allow the officer to amend his return. *Barnard* v. *Stevens*, 2 Aik. 429; *Brainerd* v. *Burton*, 5 Vt. 97; *Bent* v. *Bent*, 43 Vt. 42; *Pond* v. *Campbell*, 56 Vt. 674; *Taylor* v. *Moore*, 63 Vt. 60.

ROWELL, C. J. Trespass for false imprisonment. The defendants separately justified under a justice writ in favor of the defendant Holmes against the plaintiff, issued as a capias, brought to recover for goods sold and delivered, and served by the defendant Pharneuf by arresting the plaintiff in Orleans County.

The plaintiff claims that he was in bankruptcy in Massachusetts, where he lived, and therefore was privileged from arrest, as his discharge would release him from the debt sued for. But he can take nothing by this claim, for it does not appear that he was in bankruptcy. The certified copy of the docket entries in the bankruptcy court of Massachusetts, introduced to show that he was in bankruptcy, was not admissible, as those entries were no record, but only minutes from which to make a record. *Austin* v. *Howe*, 17 Vt. 654; *Armstrong* v. *Colby*, 47 Vt. 359.

Nor was the plaintiff's testimony that he filed his petition in bankruptcy before his arrest, sufficient, though admitted without objection; for it does not appear when he filed it, and it might have been so long before the arrest that

there had been a final adjudication on his application for a discharge, which would end his privilege; and the presumption of continuance cannot be invoked for want of sufficient data, if for no other reason.

But it was error to direct a verdict for the defendants, for the testimony tended to show, if it did not thereby appear, that the defendants were trespassers *ab initio*.

At common law, when an officer arrests a man on mesne process in a civil action, he may make any place his prison, for the writ is, *ita quod habeas corpus ejus coram*, etc., which is a general authority. But when the authority is special, he must imprison accordingly; and if he imprisons elsewhere or otherwise, he is a trespasser. *Swinstead* v. *Lyddal*, 1 Salk. 408; Bac. Ab. Trespass (D). But our statute has changed the common law in respect of a general authority, and makes the authority special in such cases, notwithstanding the command of the writ remains the same, for it provides that when a defendant is arrested on mesne process in a civil action, the officer shall commit him to jail in the county where the arrest is made, unless otherwise directed by law, if there is a legal jail there, unless he exposes sufficient property to secure the officer, or some person becomes surety to the satisfaction of the officer by indorsing his name on the writ as bail. V. S. 1701, 1703.

It appearing that there was a legal jail in Orleans County, where the arrest was made, and it not being otherwise directed by law, it was the duty of the officer to commit the plaintiff there in default of exposing property or procuring bail; and it was the plaintiff's right to be committed there, unless he waived that right, and the testimony tended to show that he did not. *Ellis* v. *Cleaveland*, 54 Vt. 437. But instead of committing him there, by direction of Holmes's attorney,

given pursuant to an understanding with Holmes, the officer took him to St. Albans, and lodged him in the Franklin County jail for safe keeping till the time of trial, where he remained about an hour in a cell, and then, by advice of counsel whom he consulted about leaving him there, and about making his return if he did leave him there, the officer took him back to Richford, where he was released by order of Holmes or his attorney on July 30, having been arrested at North Troy on July 28. This, if done without the plaintiff's consent, made the officer a trespasser *ab initio*. *Bond* v. *Wilder,* 16 Vt. 393; *Hall* v. *Ray,* 40 Vt. 576; *Clayton* v. *Scott,* 45 Vt. 386.

It is claimed that the officer might keep the plaintiff where he pleased, notwithstanding the statute, because if he committed him to jail in Orleans County by delivering him to the keeper thereof within the same, and giving the keeper an attested copy of the writ with his return thereon, as he would have to do by statute, he would thereby have transferred the custody and control of him to the jailor, and so have put it out of his power to obey his precept by having him before the justice at the time and place of trial. But *In re Jennison,* 74 Vt. 40, 51 Atl. 1061, holds the other way. There the relator was arrested on a justice writ issued as a *capias,* and committed to jail for want of bail; and yet the Court said it was the duty of the officer to obey his precept by producing the relator at the time and place of trial; and because he did not, the relator was discharged, but by agreement of the parties. That case is express authority for the proposition that by obeying the statute in respect of committing, the officer does not put it out of his power further to obey his precept by having the defendant before the justice at the time and place of trial. To hold otherwise would bring

the precept and the statute into conflict, whereas they should be made to harmonize if possible. And there is no difficulty in harmonizing them, for although the officer, by taking the defendant out of jail for production in court, would be incapacitated to recommit him on the original writ, because that, being returned into court, could not be taken out for that purpose; yet the court, especially as it is a court of record, would have ample authority to order him committed for want of bail, and such commitment would be deemed to be on the original writ, the same as it is by statute when a surety on mesne process delivers the principal into court in discharge of himself. Although there seems to be no statute for this, yet the authority inheres in the court, as much as the authority did before the statute to do what the statute says shall be done when the principal is surrendered, as shown by *Abells* v. *Chipman,* 1 Tyler, 377. And see 1 Tidd Pr. 285, 286. Cf. *Worthen* v. *Prescott,* 60 Vt. 68, 11 Atl. 690, and *State* v. *Shaw,* 73 Vt. 159, 50 Atl. 863, and following.

The cases referred to in support of said claim are not in point. What is said in *Whitcomb* v. *Cook,* 38 Vt. 477, about the officer having a right to put the defendant into any suitable place for safe keeping, was said in respect of keeping him after notice that he would appear before the magistrate for examination for a discharge from arrest, which suspended the right to commit until the examination was had. In *Kenerson* v. *Bacon,* 41 Vt. 573, commitment was made in disregard of such a notice, which was held to deprive the defendant of his right to go before the magistrate, because, as it would seem to have been thought, the officer could not take him out for that purpose. But this is not authority for saying that he could not take him out to produce in court, concerning which the precept commanded him, but did not com-

mand him concerning taking him before the magistrate for examination for discharge from arrest. In *Durant's* case, 60 Vt. 176, 12 Atl. 650, the process on which the arrest was made was a warrant in a criminal case. What is there said about its having "been repeatedly held in civil cases that an officer may use the common jail for the safe keeping of a person arrested on a *capias,* whom it is his duty to keep safely so to have him to appear at a time and place named," referring to *Whitcomb* v. *Cook,* 38 Vt. 477, is disapproved, if it means less than a commitment in the statutory sense. In *Kent* v. *Miles,* 68 Vt. 48, 33 Atl. 768, and 69 Vt. 379, 37 Atl. 1115, the precepts were warrants in a criminal case, and the authority was general, as neither the warrants nor the law required commitment to jail. But the plaintiff was committed, and rightly, it was held. In the 69th the Court expressly said that the case did not come within V. S. 1701, and said that that section relates to service of legal process when the officer is "directed by the process to commit to jail." Counsel seize upon this as making in their favor. But the language of the section makes it broader than that. It is, when "required by law to commit to jail." This embraces the case at bar, for although the process did not require commitment to jail, the statute did.

And the defendant Holmes is a trespasser *ab initio* as well as the officer, for he procured the suit to be brought and the arrest to be made, and is responsible for his attorney's direction to have the plaintiff taken to jail in St. Albans, for that direction was within the scope of his attorney's authority by virtue of his employment as such, who was thereby invested as Holmes's agent with large and liberal discretion and most ample authority in everything pertaining to the collection of the debt and the control and service of the process.

Willard v. *Goodrich,* 31 Vt. 597, where it is held that the attorney of an execution creditor has full authority as such to direct the officer as to the time and manner of enforcing the execution, short of discharging it without satisfaction.

Trespass for false imprisonment lies against the client and his attorney where the latter sues out an illegal *ca. sa.* and causes the defendant to be arrested and imprisoned thereon. "The client commands the attorney; the attorney actually commands the sheriff's officer; the real commander is the attorney; the nominal commander is the plaintiff in the action; so attorney and client are both principals." *Barker* v. *Braham,* 3 Wils. 368, 377. In *Bates* v. *Pillings,* 6 B. & C. 38, attorney and client were held jointly liable in trespass for the issue and service of an execution by the attorney's agent after the demand had been paid, though neither of them directed or knew of its issue. In *Cook* v. *Wright,* R. & M. 278, it was held that where a trespass was committed in the service upon the defendant therein of a *fi. fa.* sued out by an attorney, it was necessary, in order to make the execution creditors liable, to show that the attorney was retained in the case; and when that appeared, the creditors were made trespassers by the act of their attorney. In *Newberry* v. *Lee,* 3 Hill, 523, it is held that where an attorney of record illegally sues a *fi. fa.,* and thereby renders himself liable as a trespasser, his client is liable also, without showing that he specially directed its issue. In *Foster* v. *Wiley,* 27 Mich. 244, 15 Am. Rep. 185, it was held that where plaintiff's property was taken and sold on an execution wrongly issued at the instance of the defendant's attorney, the defendant was liable in trespass. The Court, speaking through Judge Cooley, said it seemed to be the result of the authorities that when one puts his case against another into the hands of an attorney for suit, it is a reason-

able presumption that the authority he intends to confer upon the attorney includes such action as the latter, in his superior knowledge of the law, may decide to be legal, proper, and necessary in the prosecution of the demand, and that consequently, whatever adverse proceedings may be taken by the attorney are to be considered, as far as they affect the defendant in the suit, as approved by the client in advance, and therefore as his acts, even though they prove to be unwarranted by the law. In *Poucher* v. *Blanchard,* 86 N. Y. 256, it was said not to matter that the sale of the boat in question was a pure trespass, for it had been frequently decided that a client may be responsible for a trespass committed by his attorney that he in no way authorized except by his general employment of the attorney. It is said in *Moulton* v. *Bowker,* 115 Mass. 36, that an attorney at law has authority by virtue of his employment as such, to do in behalf of his client all acts, in court or out, necessary or incidental to the prosecution and management of the suit, and which affect the remedy only, and not the cause of action. In *Morgan* v. *Joyce,* (N. H.), 27 Atl. Rep. 225, it was held that the plaintiff, by employing an attorney to bring and prosecute a suit, authorized him to give directions for serving the writ, and was bound by them.

When the plaintiff was released from arrest, the suit was abandoned by the defendant Holmes, who did nothing more with it. Nor was the justice present at the time and place of trial, nor within two hours thereafter, nor was the case continued. So it was never entered in court, and was discontinued, and the jurisdiction of the justice lapsed. He had, therefore, no authority six months afterwards, and after this suit was commenced and being prepared by the defendants for trial, to allow the defendant Pharneuf to amend his return

on the writ by adding thereto that he safely kept and detained the plaintiff within his precinct until the 30th of July, when he released and discharged him from custody by direction of Holmes's attorney. *Fletcher* v. *Pratt,* 4 Vt. 182; *Orvis* v. *Isle La Motte,* 12 Vt. 195. So the return as amended must be laid out of the case.

The testimony tended to show that the justice who signed said writ, kept all the writs and files in cases before him in which Holmes's attorney in said suit was attorney for the plaintiffs, in said attorney's office, and that the writ in that case was returned by the officer to said attorney's office before the return day, where it was put with the justice's other files, with a return upon it stating only that at North Troy in Orleans County, on July 28, 1902, "I served this writ by arresting the body of the within named defendant, Burt Gibson, read the same in his hearing, and this my return endorsed hereon." It does not appear that the fact that the writ was returned to the office of said attorney, was ever brought to the attention of the justice.

But treating that for present purposes as a sufficient returning to the justice, the officer's return was not sufficient to enable him to justify under the process. The writ commanded him to "make service and return according to law." This is the form prescribed by statute, which requires officers to execute and return writs and precepts "agreeably to the direction thereof," and subjects them to a penalty for making a false or an "undue" return. V. S. 1075, 1076. To make "return according to law" is, not only to return the precept to the authority that issued it, but to return with it a statement by the officer of his doings in executing it. *Turner* v. *Lowry,* 2 Aik. 72, 75. And that statement must recite substantially all of his doing within the scope of proper

execution, certainly, otherwise the return will be "undue," within the meaning of the statute, and may be essentially false.

Here the officer states nothing in his return but the mere fact of arrest and reading. Whether the defendant in that action exposed property, procured bail, was released by the magistrate on preliminary hearing, was committed for want of bail, or discharged by direction of the plaintiff in the action or his attorney, the return does not show, and but for the oral testimony we should not know what was done with him. It was the officer's duty to make a full and complete return of his doings, and because he did not, his return is "undue," and insufficient for his protection.

An officer who serves returnable process, shall not protect himself by it unless he shows that he has paid due and full obedience to its command. *Ellis* v. *Cleveland,* 54 Vt. 437. He must show that he has done all it was his duty to do. *Tubbs* v. *Tukey,* 3 Cush. 438. He must show that he has done all that was required of him in order to complete and fulfil the duty imposed on him. *Kent* v. *Willey,* 11 Gray, 368, 373. He must show that he made return of his writ, and did all the law required him to do. *Paine* v. *Farr,* 118 Mass. 74. He must faithfully obey every lawful command of the statute and the process, or he will be left without protection. *Boston & Maine R. R. Co.* v. *Small,* 85 Me. 462, 35 Am. St. Rep. 379, 383. There are exceptions to this rule; as, when the parties settle the suit, and agree that the writ need not be returned. *Paine* v. *Farr,* above cited. But that element does not appear in this case.

Nor is the officer's neglect to make a proper return a mere nonfeasance, any more than his neglect to return at all would be, in which case he would unquestionably be a tres-

passer *ab initio*. In *Moore* v. *Robbins*, 7 Vt. 363, 367, it is said that the neglect of an impounder to proceed with the distress according to the statute, makes him a trespasser *ab initio*, because his neglect is not a mere nonfeasance, but is analogous to a sheriff's neglect to return a writ. So a tax collector who neglects to offer a distress for sale within the time prescribed by statute, is not protected, for he is thereby deprived of a justification for the taking, and stands as though he took without authority, and therefore is a trespasser *ab initio*. *Pierce* v. *Benjamin*, 14 Pick. 356, 360. So an officer is a trespasser *ab initio* who neglects to sell property on an execution. *Bond* v. *Wilder*, 16 Vt. 393. The resolution in the *Six Carpenters' Case*, that "not doing cannot make a party who has authority or license by law a trespasser *ab initio*, because not doing is no trespass," is criticised because it is the disobedience, and not the act, that deprives of protection, and that disobedience can come from not doing as well as from doing. But that resolution is followed in this State. The true view of the matter when applied to the non-return or the insufficient return of process seems to be, that if an officer arrests a person or seizes goods on a writ that it is his duty to return, he never has a justification under it unless he discharges that duty; that it is inaccurate to say that he is made a trespasser *ab initio* by not returning; but rather, that for want of a return or a proper return, he never has a justification; that therefore, instead of saying that the want of a return makes him a trespasser *ab initio*, it would be more accurate to say that the presence of a return is necessary to make the taking lawful *ab initio*. *Shorland* v. *Govett*, 5 B. & C. 485.

But although the defendant Holmes may not be responsible for the officer's neglect to make a proper return, yet

having abandoned his suit before entry, he cannot justify under the writ.

Reversed and remanded.

STATE *v.* W. H. STIMPSON.

STATE *v.* EDWARD LEE.

May Term, 1905.

Present: ROWELL, C. J., MUNSON, START, WATSON, HASELTON, and POWERS, JJ.

Opinion filed October 25, 1905.

Constitutional Law — Contemporaneous Construction—"The Law of the Land"—"Due Process of Law"—Prosecution of Felonies by Information—V. S. 1867 — Validity—Statutory Rape—Cross-Examination of Prosecutrix—Specific Instances of Sexual Intercourse.

Constitutional requirements as to the manner of instituting prosecutions involving the deprivation of life or liberty, can neither be dispensed with by the Legislature, nor waived by the accused.

Though, in the construction of constitutional requirements, the aids of contemporaneous and practical construction must be resorted to with caution and can never be allowed to either abrogate, contradict, enlarge, or restrict the plain and obvious meaning of the text, yet, a uniform practical action affirming the right of the Legislature to exercise an important power, acquiesced in for more than a century, is strong evidence that the power is rightly used.

The phrases, "the law of the land," and "due process of law," as used in our various state constitutions, are synonymous, and mean the law in its regular course of administration through courts of justice.

The declaration in our state Constitution, that no person can "be justly deprived of his liberty, except by the laws of the land, or the judgment of his peers," does not require common law felonies to be prosecuted by indictment, and V. S. 1867, which, as amended, authorizes the prosecution by information of all crimes not capital and not punishable by life imprisonment in state prison, is not in contravention of that provision.

Where, in a prosecution for statutory rape, the prosecutrix testifies for the State, the respondent is not entitled to show by her in cross-examination, as bearing upon her credibility, that, since she was twelve years old down to the time in question, she had had sexual intercourse with many different men.

STATE *v.* STIMPSON was an information for statutory rape. Plea, not guilty. Trial by jury at the March Term, 1905, Orleans County, *Tyler,* J., presiding. Verdict, guilty; judgment and sentence thereon. The respondent excepted.

STATE *v.* LEE was an information for grand larceny. Plea, not guilty. Trial by jury at the December Term, 1904, Lamoille County, *Munson,* J., presiding. Verdict, guilty; judgment thereon. The respondent excepted.

In each case there was a demurrer to the information. Demurrers overruled, *pro forma,* and ordered to lie, to which the respondents excepted.

J. W. Redmond for *W. H. Stimpson. Taylor & Dutton* for Edward Lee.

The proceeding by information for felony is in contravention of the declaration in Art. 10 of the Bill of Rights: "Nor can any person be justly deprived of his liberty, except by the laws of the land, or the judgment of his peers." "The law of the land" includes indictment by a grand jury. This has always been the understanding in England, and is what the fathers meant by this expression. 2 Inst. 50, 51;

4 Bl. Com. 306; *Jones* v. *Robbins,* 8 Gray 329; *Com.* v. *Horrigan,* 127 Mass. 450; *Noland's Case,* 122 Mass. 330: *People* v. *Petrea,* 92 N. Y. 128; *Saco* v. *Wentworth,* 37 Me. 172, 58 Am. Dec. 786; Story Const. § 1785; *Prynn's Case,* 5 Mod. 459; Cooley Const. Lim. (7 ed.) 436; 2 Kent 12.

E. A. Cook, and *F. G. Bicknell,* State's Attorneys, for the State.

Previous to the abolition of the Court of Star Chamber prosecutions for felony were either by indictment or information. Bac. Abr., Informations; 2 Hawk. P. C. 357.

It is not unconstitutional in this country to prosecute felonies by information. *State* v. *Healey,* 52 Vt. 476; *Rowan* v. *State,* 30 Wis. 145; *State* v. *Boswell,* 104 Ind. 541; *State* v. *Ledford,* 3 Mo. 102.

ROWELL, C. J. The case against Stimpson is an information for statutory rape, and the one against Lee is an information for grand larceny. The principal question in the former, and the only question in the latter, is, whether section 1867 of the Vt. Sts., as amended by No. 46, Acts of 1898, and No. 64, Acts of 1904, is constitutional. It provides that state's attorneys may prosecute by information all crimes except those punishable by death or by imprisonment in the state prison for life. It is claimed that said section is in contravention of the declaration in the Constitution that no person can "be justly deprived of his liberty, except by the laws of the land, or the judgment of his peers." This claim is based upon the contention that the words, "laws of the land," as there used, require prosecutions for common law felonies to be by indictment, because, it is said, those words as used in *Magna Charta,* from which we bor-

rowed them, required that, by settled judicial construction in England, at the time of the adoption of our Constitution, and that it is to be presumed that we took that construction with the words. As bearing on this question, it is important to consider whether that declaration in the Constitution has received a practical construction that has been acquiesced in for a considerable time; for if it has, that will be a valuable aid, to say the least, in determining the intent and meaning of those words as there used.

As early as 1779, state's attorneys were provided for, and authorized to prosecute, manage, and plead in all matters proper, for and in behalf of the State. Slade's State Papers, 331. By an act passed November 10, 1797, it was made the duty of state's attorneys to file informations *ex-officio* in matters proper therefor. Rev. Sts. 1797, c. 64, § 1.

By an act passed February 27, 1787, it was provided that no person should be held to trial nor put to plead for a capital offence punishable with death, unless a bill of indictment was found against him therefor by a grand jury lawfully empanelled and sworn. Sts. of 1787, p. 82. This was only ten years after the adoption of the Constitution, and indicates that thus early the Legislature thought that without such an enactment one might be prosecuted for a capital offence, even, otherwise than by indictment; for it is not to be presumed that the Legislature thought it was passing a useless act. This provision was carried into the Revision of 1797, p. 106, § 65. By an act "for the punishment of certain capital and other high crimes and misdemeanors," passed March 9, 1797, it was provided that no person should be tried for any offence under said act, until a bill of indictment was found against him by the grand jurors attending the Supreme Court of Judicature. Revision of 1797, p. 173,

§ 36. This act did not include larceny, except horse stealing. On March 4, 1797, during the same session, an act was passed "for the punishment of certain inferior crimes and misdemeanors." Revision of 1797, p. 175. This act included larceny of money, goods, chattels, bonds, bills, notes, etc., regardless of value, and divers other offences, but did not provide how any of them should be prosecuted, and larceny is a felony at common law. These two statutes taken together point strongly to the conclusion that at that time it was not supposed that the Constitution required common law felonies to be prosecuted by indictment, but that it was for the Legislature to say what ones should be thus prosecuted, and what ones might be thus or otherwise prosecuted.

The act of March 9, 1797, was reenacted in 1818 with some additions, but not with the addition of larceny, and the act repealed. But the provision in respect of prosecuting by indictment was retained—Acts of 1818, p. 19, § 37—and continued in force till the Revision of 1839, unless it was changed by c. 9, § 1, of the Acts of 1819, constituting state's attorneys "informing officers," which is doubtful, although it is said in *State* v. *Magoon*, 61 Vt. at p. 47, 17 Atl. 729, that prosecution by information of all crimes was authorized by statute from 1819 to 1839.

The act of March 4, 1797, was reenacted in 1821, with an increased penalty for larceny, but was still silent as to the mode of prosecution, and continued so until the Revision of 1839.

Since 1816 it has been the law that when a person is confined in jail on a complaint for a crime or misdemeanor, the Supreme Court may, on his application in writing, direct an information to be filed against him, whereon the Court may receive and record a plea of guilty and award sentence.

V. S. 1895. The act of October 30, 1828, provided that whenever a person was in actual confinement in jail by virtue of a complaint for an offence against said act "for the punishment of certain capital and other high crimes and misdemeanors," the county court should have power and authority, on the application in writing of such person, to direct an information to be filed against him for the offence for which he stood charged, on the filing of which, it was made the duty of the court to proceed in the trial in the same way and manner as if an indictment had been presented by the grand jury. Acts of 1828, No. 3, § 3. And that has been the law ever since—V. S. 1897—and has always been acted upon, except in homicide cases, probably, and without objection as far as we know. This, in effect, is a legislative construction that the Constitution does not require prosecution by indictment in any case, unless we say that the Legislature thought the requirement, if it existed, could be waived by the accused with its consent, which we can hardly do, for the law seems to be otherwise. That mere rights and privileges guaranteed by the Constitution can be waived, to some extent at least, is probably true. But it would seem that constitutional requirements as to the mode and manner of instituting prosecutions involving the deprivation of life or liberty cannot be dispensed with by the Legislature, nor waived by the accused, even with the consent of the Legislature. Cooley Const. Lim., 6th ed., 214 *et seq.*, and 390; *Cancemi* v. *People,* 18 N. Y. 128; *Hopt* v. *Utah,* 110 U. S. 574, 579.

In 1839 it was enacted that no person should be held to answer in any court for an alleged crime or offence, unless upon indictment by a grand jury, except in case of proceedings before a justice, and when a prosecution by information was expressly authorized by statute. Rev. Sts. c. 93, § 1. This

was but the act of March 9, 1797, as reenacted in 1818, with some additions. By c. 102, § 1, of the Revision of 1839, it was provided that state's attorneys might prosecute by information all crimes not capital and where the punishment was by imprisonment in the state prison for a term not exceeding seven years. Both of these statutes are still in force, with an enlargement in the latter of the authority of the state's attorney to prosecute by information all crimes not capital and not punishable in the state prison for life.

It was decided in *State* v. *Leach,* 77 Vt. 166, 59 Atl. 168, that statutory rape can be prosecuted by information. But the constitutionality of that mode of prosecuting was not raised nor considered, and the question has never been decided by this Court, nor raised in it but twice before; once in 1880, in *State* v. *Haley,* 52 Vt. 476, and again in 1888, in *State* v. *Magoon,* above cited; in both of which, strong judicial utterances were made in favor of the correctness of the long practical construction above shown. *State* v. *Haley* was an information for a liquor nuisance, a mere misdemeanor, and the respondent contended that the proceeding should have been by indictment. But the Court held otherwise, and said that the statute had always been supposed to mean that all crimes, except capital and those for which the punishment exceeded seven years in the state prison, might be prosecuted by information, without regard to any distinction between felonies and misdemeanors, and without regard to the punishment prescribed, provided it did not exceed seven years in state prison, and was not capital, and that such had been the construction and uniform practice by all courts, judges, state's attorneys, and lawyers down to that time. *State* v. *Magoon* was an information for grand larceny. The Court said that prosecutions by information for high crimes having been au-

thorized by statute from a time reaching back to a period when many of those who framed and adopted our present Constitution were living, and those statutes having been acted upon unquestioned for nearly seventy years,—it would not be profitable to consider the respondent's contention of unconstitutionality, its consideration being unnecessary. The question was not involved in *State* v. *Dyer,* 67 Vt. 690, 32 Atl. 814. That was an information for conspiracy, held to be a misdemeanor, and the contention was that the case did not come within the statute authorizing the state's attorney to prosecute by information, because the punishment might be by imprisonment in the state prison for more than seven years.

Thus it appears that during substantially the whole time since the adoption of the Constitution, the Legislature has practically construed the clause in question not to require common law felonies to be prosecuted by indictment; and this construction has been acquiesced in and accepted as correct by the courts, and with great unanimity by the profession generally, many of the best of whom have revised the statutes from time to time, commencing with that great lawyer, Nathaniel Chipman, in 1797, who was prominently active in public affairs during the formative period of the Constitution, and must have been imbued with its spirit and meaning.

There is abundant authority for saying that after this long acquiescence in that construction it should not be departed from, but should be accepted as correct beyond the permissibility of question. In *State* v. *Bosworth,* 13 Vt. 402, 413, it is said that questions arising under the Constitution, settled by a long and uniform practice, questioned in the judicial tribunals but once, and then sanctioned, should be considered at rest. Where, the Court asked, is the security

of individual rights, if constitutional questions are to be considered as always open, if no acquiescence, even though sanctioned by judicial decree, is to be regarded as settling them? There the construction had obtained only thirty-four years, while here it has obtained more than a hundred years. See also, *Boyden* v. *Brookline,* 8 Vt. 284.

In *Lincoln* v. *Smith,* 27 Vt. 328, 345, this Court adopted the language of the Supreme Court of the United States in *Briscoe* v. *Bank of the Commonwealth of Kentucky,* 11 Pet., at p. 318, that "a uniform action involving the right to the exercise of an important power by the state government for half a century, and this almost without question, is no unsatisfactory evidence that the power is rightly exercised." In *Stuart* v. *Laird,* 1 Cranch, 299, it was objected that the Judges of the Supreme Court had no right to sit as circuit judges, not being appointed nor commissioned as such. But the Court said that practice and acquiescence under it for several years, commencing with the organization of the judicial system, afforded an irresistible answer to the objection, and had fixed the construction of the Constitution, which was too strong to be shaken or controlled.

There are many more cases to the same effect, but they need not be referred to. The subject is pretty fully treated in Cooley's Const. Lim., 7th ed., 102 and following. See, also, Black, Int. Laws, 31; Lewis's Suth. Stat. Const. § 476; Endlich Int. Sts. § 527. But the aids of contemporaneous and practical construction must be resorted to with caution and reserve, and can never be allowed to abrogate, contradict, enlarge, nor restrict the plain and obvious meaning of the text.

As to the true meaning of the words, "law of the land," and "due process of law," as used in the constitutions of our

states, there is a diversity of opinion; but all agree that they mean the same thing, whatever that is, and that if they were combined to read, "due process of the law of the land," the meaning would not be changed.

The Supreme Court of the United States had this question under consideration in 1883, in *Hurtado* v. *California*, 110 U. S. 516; and pretty much all that can be said on the subject was there brought out in the majority opinion by Mr. Justice MATTHEWS, and in the dissenting opinion of Mr. Justice HARLAN.

The Constitution of California, adopted in 1879, provides that offences theretofore required to be prosecuted by indictment shall be prosecuted by information, after examination and commitment by a magistrate, or by indictment, with or without such examination and commitment, as may be prescribed by law; and that a grand jury shall be summoned at least once a year in each county. By the Penal Code of the State, when a defendant has been examined and committed as thereby provided, it is the duty of the district attorney to inform against him for the offence. The plaintiff in error having been thus examined and committed for murder, the district attorney informed against him for that crime, and he was convicted and sentenced to death, and the question was whether that was "due process of law" within the meaning of the Fourteenth Amendment of the Federal Constitution, which forbids the states to "deprive any person of life, liberty, or property without due process of law," and it was held that it was; that an indictment or a presentment by a grand jury as known to the common law of England, is not essential to that "due process of law," when applied to prosecutions for felonies, that is guaranteed by the Federal Constitution, and forbidden to the states to dispense with in the

administration of criminal law; that those words refer to the law of the land in each state that derives its authority from the inherent and reserved powers of the state, exerted within the limits of those fundamental principles of liberty and justice that lie at the foundation of all our civil and political institutions, the greatest security for which lies in the right of the people to make their own laws, and to alter them at pleasure. The Court said that in this country, written constitutions were deemed essential to protect the rights and liberties of the people against the encroachments of power delegated to their governments, and so the provisions of *Magna Charta* were incorporated into Bills of Rights; that they were limitations upon all the powers of government, legislative as well as executive and judicial; that it necessarily happened, therefore, that as these broad and general maxims of liberty and justice held in our system a different place and performed a different function from their position and office in English constitutional history and law, they would justify and receive a corresponding and more comprehensive interpretation; that they applied in England only as guards against executive usurpation and tyranny, while here they have become bulwarks also against arbitrary legislation; but, in that application, as it would be incongruous to measure and restrict them by the ancient customary law of England,they must be held to guarantee, not particular forms of procedure, but the very substance of individual rights to life, liberty, and property. The Court approved and commended as most accurate the language of Mr. Justice JOHNSON in *Bank of Columbia* v. *Okeley,* 4 Wheat. 235, 244, when he said, speaking of those words from *Magna Charta,* incorporated into the Constitution of Maryland, that "after volumes spoken and written with a view to their exposition, the good sense of mankind

has at last settled down to this,—that they were intended to secure the individual from the arbitrary exercise of the powers of government, unrestrained by the established principles of private rights and distributive justice." Such is the oft-repeated and settled doctrine of that Court. And this Court approved that doctrine in *State* v. *Hodgson,* 66 Vt. 134, 157, 28 Atl. 1089, which was affirmed by the Supreme Court of the United States in *Hodgson* v. *Vermont,* 168 U. S. 262. And such has been and is, the prevailing opinion in this country, both judicial and individual. Chancellor KENT says that "the better and larger definition of 'due process of law' is, that it means law in its regular course of administration through courts of justice." 2 Com. *13. Webster's famous definition in the Dartmouth College case is often quoted. "By the law of the land," he says, "is most clearly intended the general law; a law that hears before it condemns; that proceeds upon inquiry, and renders judgment only after trial. The meaning is that every citizen shall hold his life, liberty, property, and immunities under the protection of the general rules that govern society," etc. Judge COOLEY says this definition is apt and suitable to judicial proceedings. He says that he has met in no judicial decision a statement that embodies more tersely and accurately the correct view of the matter than the language of Mr. Justice JOHNSON above quoted. He then goes on to say, that "the principles, then, on which the process is based, are to determine whether it is 'due process of law' or not, and not any considerations of mere form," which, he says, may change from time to time, with due regard to the landmarks established for the protection of the citizen. Const. Lim. *355. Again he says, "Due process of law in each particular case means, such an exertion of the powers of government as the settled maxims of law permit

and sanction, and under such safeguards for the protection of individual rights as those maxims prescribe for the class of cases to which the one in question belongs." Ib. *356.

The Supreme Court of Tennessee says that "when first adopted in *Magna Charta,* the phrase, 'law of the land,' had reference to the common and statute law then existing in England; and when embodied in our Constitution, it referred to the same common law as previously modified, and as far as suited to the wants and conditions of our people in a new country. At present, the 'law of the land' embraces the same body of laws as still further modified; those parts validly cut off being now excluded, and those parts validly added being now included. Every valid statute of the State now in existence, whenever enacted, is the present 'law of the land' in respect to the subject-matter of that statute, and every existing enactment passed with due form and ceremony and not in conflict with some provision of the State or Federal Constitution, is a valid statute; and no statute otherwise valid is unconstitutional because affecting life, liberty, or property, if, when being general, it embraces all persons who are or may be in like situation and circumstances, or, when being special, it is, in addition, natural and reasonable in its classification." *Harbison* v. *Knoxville Iron Co.,* 103 Tenn. 421, 437, 76 Am. St. Rep. 682, affirmed in 183 U. S. 13.

The Supreme Court of Mississippi says in *Brown* v. *Levee Commissioners,* 50 Miss. 468, speaking of the words, "due process of law," that "the principle does not demand that the laws existing at any point of time shall be irrepealable, nor that any forms of remedies shall necessarily continue. It refers to certain fundamental rights which that system of jurisprudence, of which ours is a part, has always recognized. If any of these are disregarded in the proceedings by which a

person is condemned to the loss of life, liberty, or property, the deprivation has not been by 'due process of law.'"

The Constitution of Wisconsin originally declared that "no person shall be held to answer for a criminal offence, unless on presentment or indictment of a grand jury." That clause was amended in 1870 so as to read, "no person shall be held to answer for a criminal offence without due process of law." The statute of 1871 provided that the several courts of the State should possess, and might exercise, the same power and jurisdiction to try prosecutions on information for all crimes, as they possessed and might exercise in cases of like prosecution on indictment. *Rowan* v. *State,* 30 Wis. 129, was an information for murder, and the question was whether the amendment changed the meaning of the Constitution, or, in other words, whether "due process of law," and, "on presentment or indictment of a grand jury," meant the same thing, and it was held that they did not. The Court said that the words, "due process of law," did not mean, and had not the effect, to limit the powers of the State to prosecution of crime by indictment, but meant law in its regular course of administration according to prescribed forms and in accordance with the general rules for the prosecution of individual rights.

The Supreme Court of Texas says that when the words, "law of the land," were used in *Magna Charta,* they probably meant the established law of the kingdom in opposition to the Roman law, which was about being introduced into the land, but that now, in their most usual acceptation, they are regarded as meaning general public laws, binding all the members of the community in similar circumstances, and not partial or private laws, affecting the rights of private individuals. *Janes* v. *Reynolds,* 2 Tex. 250.

The Supreme Court of California, in the judgment under review in the *Hurtardo* case, followed its previous decision in *Kalloch* v. *Superior Court,* 56 Cal. 229, in which it held that the proceeding, as regulated by the Constitution and laws of the State, was not opposed to any of the definitions of "due process of law" and "the law of the land," but was strictly within such definitions, as much as was a proceeding by indictment, and took from the accused no immunity nor protection to which he was entitled under the law.

In Utah, the words, "due process of law," are held to mean, law in the regular course of administration through the courts. *In re McKee,* 19 Utah 231, 242. Indiana holds the same. *State* v. *Boswell,* 104 Ind. 541.

It is said in *Hoke* v. *Henderson,* 4 Dev. Law, 15 N. C. 1, 25 Am. Dec. pp. 688, 689, that the words, "law of the land," do not mean merely an act of the General Assembly; for if they did, every restriction upon legislative authority would be at once abrogated. But that they mean that such legislative acts as profess in themselves directly to punish persons, or to deprive the citizen of his property without trial before the judicial tribunals, and a decision upon the matter of right as determined by the laws under which it vested, according to the course, mode, and usages of the common law,— are not effectually laws of the land for those purposes.

Many of the other states adopt the view of the cases referred to, but some of them hold the other way, notably Massachusetts in *Jones* v. *Robbins,* 8 Gray 329.

Mr. Stephen says in the first volume of his History of the Criminal Law of England, p. 595, that "from the earliest times, the King accused persons of offences not capital in his own court by the agency of his legal representatives without the intervention of a grand jury."

But it is objected that *Hurtardo* v. *California* is not in point here, because, the case coming within the Penal Code of that State, its Constitution expressly authorized prosecution by information, whereas our Constitution gives no such authority. But the objection is not well taken, for if an information for a capital offence was forbidden by the Fourteenth Amendment, the Constitution of the State could not authorize it in any circumstances. So the case is precisely in point.

Thus it appears that the practical construction that our Constitution has so long received in this respect accords with the prevailing opinion in this country, which we think the better opinion, and therefore we the more readily hold that our Constitution does not require common law felonies to be prosecuted by indictment, and that consequently the statute in question is constitutional.

In the rape case, it appeared that the girl consented in fact, but she could not consent in law, as she was under the age of consent. As bearing on her credibility as a witness, and as tending to show a motive to charge the respondent with the crime, the respondent offered to show by her on cross-examination that she was six or eight months gone with child, and was never pregnant before; and that ever since she was twelve years old, down to the time in question, she had had sexual intercourse with many different men. The State offered to admit her pregnancy, but objected to her being cross-examined as to her intercourse with other men. But the respondent did not want the admission of pregnancy unless he could cross-examine as to the intercourse, which was not permitted.

As a general rule, particular acts of misconduct are not provable by extrinsic evidence. In this State, you cannot

prove by such evidence that a woman is a prostitute, for the purpose of impeaching her credibility as a witness. *Morse* v. *Pineo,* 4 Vt. 281; *State* v. *Smith,* 7 Vt. 141; *Spears* v. *Forrest,* 15 Vt. 435. Nor that a witness is a notorious counterfeiter. *Crane* v. *Thayer,* 18 Vt. 162. Nor the keeper of a house of ill-fame. *State* v. *Fournier,* 68 Vt. 262, 270.

State v. *Hollenbeck,* 67 Vt. 34, 30 Atl. 696, relied upon by the respondent as expressly deciding this question, is not in point. That was an indictment for rape *simpliciter,* and the woman was of the age of consent, as shown by the record in that case, and as is inferable from the case as reported. In such a case, there is no doubt but the respondent has a legal right to cross-examine the complainant as to her intercourse with other men; not to shake her credit as a witness, but to show her consent, and so no rape. What is said in that case about allowing the cross-examination to be as unrestricted and searching as consistent with the rules of law, related to the refusal of the trial court to accord to the respondent his legal right to show by the complainant that her relations with him were friendly and cordial at the time of the alleged offence, and continued so afterwards. Whether in the case at bar the court could have allowed the cross-examination as matter of discretion, is a question not before us.

As to a motive to charge the respondent unjustly, the case as presented would afford no ground for such an inference had the claimed intercourse with other men been shown.

Judgment in Stimpson's case that *there is no error in the proceedings of the county court, and that the respondent take nothing by his exceptions;* and judgment in Lee's case that *there is no error, and that sentence be imposed and execution thereof done.*

CHARLES WARD *v.* DELOS MARVIN.

May Term, 1905.

Present: ROWELL, C. J., MUNSON, START, WATSON, HASELTON, and POWERS, JJ.

Opinion filed November 2, 1905.

Sales—Rescission for Fraud—Remedies of Defrauded Buyer —Use of Property After Discovery of Fraud—Effect.

Where a person has been induced to buy goods by the fraudulent misrepresentations of the seller, he is entitled either to sue the seller for the fraud, or to rescind the contract, and if he has paid the purchase price, to recover it under a count for money had and received to his use.

But, if he would rescind, he must do so within a reasonable time after he discovers all the essential elements of the fraud, or that remedy will be lost to him.

What is this reasonable time, within which he must rescind, depends upon the circumstances of each particular case. If there is involved only the length of time elapsed, it is a question of law. But if disputed facts, involving matter of excuse, discovery of the fraud, and the like are to be passed upon, it is a mixed question of law and fact, and is for the jury.

In assumpsit to recover the purchase price of a horse which plaintiff had been induced to buy of defendant by the latter's false and fraudulent misrepresentations, it appeared that before the attempted rescission of the contract, and after plaintiff fully discovered the fraud practiced upon him, he continued to use the horse. *Held*, that plaintiff thereby affirmed the contract, and could not afterwards rescind it.

GENERAL ASSUMPSIT to recover the purchase price of a horse. Plea, the general issue. Trial by jury at the March Term, 1905, Orleans County, *Tyler*, J., presiding. Verdict and judgment for the plaintiff. The defendant excepted.

Cook & Williams for the defendant.

Any use of the property, after the discovery of the fraud, is a waiver of the right to rescind. *Mayer* v. *Dwinell,* 29 Vt. 298; Benjamin, Sales, § 675; *Cookingham* v. *Dusa,* 41 Kan. 229; 41 Kan. 444; 105 Mass. 551; 83 N. Y. 300; 4 Mass. 502; 42 N. H. 316.

J. W. Redmond for the plaintiff.

POWERS, J. Assumpsit for the recovery of the purchase price of a certain horse which the plaintiff purchased of the defendant on or about the 15th of April, under the latter's false and fraudulent representation that it was a good, moderate worker, practically sound, not more than eight years old, and suitable to work with a Percheron horse which the plaintiff then owned.

Within a day or two after the purchase, the plaintiff discovered that the horse was a "puller" and a "whistler" when used as a driver, but thought that it might act better in that regard when put to work; within a week he found that the horse worked too fast for the Percheron, and that it had various physical defects and vices which seriously impaired its value; but he bought the horse for a work horse, and thinking that it might work down and improve after being used longer with the Percheron, and so made to answer his purpose, the plaintiff continued to use the animal until the 8th day of May, when he became satisfied that it was not such a work horse as it had been represented to be, and wrote the defendant to that effect. Soon after, the parties had an interview regarding the matter, and the defendant told the plaintiff that if the horse was not as represented he would make it right. Relying upon this, the plaintiff waited until the

6th day of June, and nothing having been done by the defendant toward making it right, the plaintiff again wrote him, fixing a time within which the matter would have to be adjusted. On the 20th day of June the parties met and the defendant refused to take back the horse and return the purchase price, and a day or two later, the plaintiff formally tendered back the horse and demanded the price. During all this time the plaintiff continued to work and use the horse.

At the close of the plaintiff's evidence the defendant rested and moved for a verdict upon two grounds: 1. That the rescission and tender back of the property were so long after the discovery of the fraud, that as matter of law it was too late. 2. That the plaintiff, after discovering the fraud, made his election to stand upon the contract by continuing to use the horse. The motion was overruled, and the defendant excepted.

1. When a person has been induced to buy goods by the fraudulent misrepresentations of the seller, he is entitled either to sue the seller for the fraud, or he may, on discovering the fraud, rescind the contract, and if he has paid the purchase price, recover it under a count for money had and received to his use, provided he can restore the article purchased in the same state as that in which he received it. But, if he would rescind, he must act promptly or that remedy will be lost to him. The law does not require him to act upon the appearance of the first indication of fraud, but allows him a fair opportunity to ascertain the extent of the false representations and to test the quality of the article fraudulently put upon him. All the law requires is that he shall act within a reasonable time after the discovery of all the essential elements of the fraud. *How* promptly one must act to be within this rule of law depends upon the circumstances of each par-

ticular case, and when there are no facts involved but the simple one of the length of time elapsed, it is a question of law. But when disputed facts, involving questions of excuse, discovery of fraud, and like matters, as in this case, are to be passed upon, the question is a mixed one of law and fact, and is for the jury. This is the settled law of this State as established by *Whitcomb* v. *Denio,* 52 Vt. 390; *Chamberlain* v. *Fuller,* 59 Vt. 252, 9 Atl. 832; *Norton* v. *Gleason,* 61 Vt. 478, 18 Atl. 45, and recently approved in *Brainard* v. *Van Dyke,* 71 Vt. 359, 45 Atl. 758. There was nothing in this case to take it out of this general rule, and there was no error in submitting the case to the jury on that question.

2. The second ground of the defendant's motion is more serious. The plaintiff could not treat the contract as subsisting after he discovered the fraud and afterwards avoid it. Upon discovering the fraud, he had his election to affirm or disaffirm the contract; he could not do both. And when he has once made his election to affirm, the law requires that he adhere to it. *Barrett* v. *Tyler,* 76 Vt. 108, 56 Atl. 534. His conduct in continuing to use and treat the horse as his own after the discovery of all the essential features of the fraud amounted to an election to recognize the contract as binding, and precluded a subsequent rescission. I Benj. Sales, § 675; *Cookingham* v. *Dusa,* 41 Kan. 229; *Downer* v. *Smith,* 32 Vt. 1, *Barrett* v. *Tyler, supra.* It is urged that the plaintiff was induced to act as he did by the conduct of the defendant. He was induced to delay action by the defendant's assurance that he would make it right if the horse was not as represented; and so far as the *delay* thus caused is concerned it would excuse him, if in the opinion of the jury it was not unreasonable. But he did more than delay, he continued to work the horse, and his continued use of the horse was not

so induced by the defendant. There was nothing in the defendant's statement or conduct that can be construed as a permission to use the property during the time negotiations for a settlement were pending. The defendant said he would make it right if the horse was not as represented. And that is all there was to the statement. In working the horse after that, the plaintiff must be held to have acted voluntarily, and having dealt with the horse as his own, after fully discovering the fraud practiced upon him, he waived his right to rescind. *Tarkington* v. *Purvis,* (Ind.) 9 L. R. A. 607. In view of this holding the other questions raised by the exceptions are unimportant and are not considered.

Judgment reversed and cause remanded.

GEORGE L. JOHNSON *v.* A. D. SMITH, ET AL.

October Term, 1904.

Present: ROWELL, C. J., TYLER, MUNSON, START, and POWERS, JJ.

Opinion filed November 2, 1905.

Vested Rights—Law of Procedure—Statutes—Retroactive Effect—Death of Judge—Inability to Procure Exceptions —No. 35, Acts 1902.

No person has a vested right in any particular course of procedure for obtaining a remedy.

A statute which only changes the mode of judicial procedure for the enforcement of a right, and in no way affects the right itself, has retroactive effect, and applies to actions pending at its passage,—in the absence of a saving clause.

It was only as a part of the law of procedure that, before the enactment of No. 35, Acts 1902, a party who was precluded from seasonably filing his bill of exceptions was entitled to a new trial, hence he could have no vested right to that remedy.

This case was tried in county court in June, 1900, and resulted in a verdict for defendants, whereupon plaintiff moved to set aside the verdict for alleged misconduct of the jurors, and the case was entered "with the court," and held by the presiding judge till his death, after which, and at the December Term, 1900, defendants moved for judgment, and plaintiff having abandoned his former motion, moved for a new trial, on the ground of his inability to obtain a bill of exceptions. The court, as matter of law, overruled defendants' motion, and granted that of plaintiff. *Held* error; for No. 35, Acts 1902, which provides that, upon the death of the trial judge, any judge of the Supreme Court may allow exceptions, is retroactive and applies to this case, and therefore, plaintiff's motion was groundless.

GENERAL ASSUMPSIT. Pleas, the general issue, payment, Statute of Limitations, and declaration in offset. Trial by jury at the June Term, 1900, Caledonia County, *Taft*, J., presiding. Verdict for defendants. Whereupon plaintiff moved to set the verdict aside on account of the alleged misconduct of the jury. On this motion the case was entered "with the court," to be heard after testimony had been taken in support of said motion. No testimony was ever taken, and the case was "with the court" when Judge Taft died, March 22, 1902.

At the December Term, 1903, *Watson*, J., presiding, plaintiff having abandoned his said motion, defendants moved for judgment on the verdict, and plaintiff moved to set aside the verdict, and asked for a new trial, on the ground that he had been precluded from obtaining his bill of exceptions by the death of Judge Taft. The defendants' motion was overruled, as matter of law, to which defendants excepted. Plaintiff's

motion was granted as matter of law, to which defendants excepted.

J. P. Lamson, and *May & Hill* for the defendants.

Plaintiff's exceptions could be reviewed by a writ of error, hence he has an ample remedy. *Smith* v. *Keyes,* 2 Aik. 77; *Beckwith* v. *Houghton,* 11 Vt. 602; *Esterbrooks* v. *Ins. Co.,* 74 Vt. 202; *Blodgett* v. *Adams,* 24 Vt. 23; *Small* v. *Hasking,* 35 Vt. 172; *Carpenter* v. *Dale,* 13 Vt. 578; *Snow* v. *Carpenter,* 54 Vt. 17.

Dunnett & Slack for the plaintiff.

A new trial will be granted where a party is prevented from obtaining his bill of exceptions by the death of a judge. 1 Jacb. Fish. Dig. Col. 1050; 14 Enc. Pl. & Pr., 736; *Hake* v. *Strubel,* 12 N. E. 676.

No. 35, Acts 1902, is not retroactive, and so does not apply to this case. End. Int. Sts. § 271; *Dash* v. *Van Kleeck,* 7 Johns. 503; *U. S.* v. *Heth,* 3 Cranch, 399; *Sohn* v. *Watterson,* 17 Wall. 598; *Chew Heong* v. *U. S.,* 112 U. S. 559; *Richardson* v. *Cook,* 37 Vt. 599; *Briggs* v. *Hubbard,* 19 Vt. 86; *Sturges* v. *Hull,* 48 Vt. 302.

POWERS, J. The defendants obtained a verdict at the June Term, 1900, of Caledonia County Court, which the plaintiff moved to set aside for misconduct of certain of the jurors and of the officer who had them in charge. With this motion pending, the case was entered "with the court," and was held by the late Chief Judge TAFT, who presided at the trial, until his death. So no judgment had been entered upon the verdict, and no bill of the exceptions taken by the plaintiff during the course of the trial had been signed. In these

circumstances, as the law then stood, the plaintiff was without means of having the case reviewed in this Court, and was, therefore, entitled to have the verdict set aside and a new trial granted. See *Nelson* v. *Marshall,* 77 Vt. 44, 58 Atl. 793, and cases cited. But before the plaintiff took further action in the matter, No. 35, Acts of 1902, became effective. By this act it is provided that "In case of the decease of a judge of the Supreme Court, any judge of that Court may allow or amend exceptions in a case tried by such deceased judge." At the December Term, 1903, of Caledonia County Court, the plaintiff having withdrawn his former motion, the defendants moved for a judgment on the verdict, and the plaintiff moved to set aside the verdict and for a new trial. The latter motion being based on the plaintiff's inability to obtain a bill of exceptions on which to have his case heard in this Court. The defendants' motion was overruled, and the plaintiff's granted—both questions being ruled as matter of law. The case is here on the defendants' exceptions to these rulings.

The determination of the question thus presented depends upon the character of the right which entitles an excepting party to a new trial when the presiding judge dies without signing the bill. For if the right is a vested one it is beyond the reach of the Legislature, and the act of 1902 could not divest it. On the other hand, if it springs simply from a rule of procedure, the act of 1902 applies, and the plaintiff is provided with ample means for the prosecution of his exceptions, and the necessity, upon which is based the right to a new trial, is removed, and the reason for such procedure fails. While it is true as a general rule of construction that retroactive effect is not favored in the absence of terms clearly indicating such legislative intent, it is equally true that

a statute which is designed to change the mode of judicial procedure only, where such change relates to the method of enforcing a right and does not affect the right itself, applies to causes of action which accrued prior to its enactment as well as to those which accrue thereafter, and takes effect upon a pending action as it stands when the act becomes operative,—in the absence of a saving clause. *Richardson's Admr.* v. *Richardson's Exrs.*, 37 Vt. 599; *Murray* v. *Mattison*, 63 Vt. 479, 21 Atl. 532; *Willis* v. *Fincher*, 68 Ga. 444; *In re Savings Bank*, 69 N. H. 84. Our statute, V. S. 28, is in harmony with this rule of construction, for while it provides, speaking generally, that no act of the General Assembly shall affect pending suits, it expressly excepts from its provisions acts regulating "practice in courts,"—a term broad enough to cover all matters of judicial procedure.

The rule granting a new trial under the circumstances here existing seems to have received its first announcement in *Newton et ux.* v. *Boodle et al.*, 54 E. C. L. 795, decided in 1847. The case was tried before Chief Justice TINDAL, who ordered a verdict for one of the defendants, to which the plaintiffs excepted. A bill of exceptions was prepared and presented to the lord chief justice, but he ultimately died without having sealed the bill. Thereupon, after some delay, judgment having been signed, the plaintiffs moved for a rule upon the defendants to show cause why, among other things, the judgment should not be set aside and a new trial granted. In granting the rule, Chief Justice WILDE used this language: "If it should turn out, upon examination, that the plaintiffs have, without any fault of their own, but solely from the circumstance alluded to lost the benefit of their bill of exceptions, the court think that the justice of the case may require that they should have an opportunity to try the cause

again. At the same time, it is to be observed that there was an interval of nearly seventeen months between the day of the trial and the decease of the late chief justice; and it is rather a fearful thing to say that the whole proceedings should be re-opened after so great a delay. As, however, we have not the facts sufficiently before us to enable us to determine how far the plaintiffs are to be held responsible for this delay, and with a view to prevent a failure of justice by reason of the happening of an event beyond human control, we think a rule may go, calling upon the defendants to show cause why there should not be a new trial upon the point as to the sufficiency of the evidence to fix Norman." It is apparent from this language that the learned chief justice did not consider that the plaintiffs had a vested right to a new trial, or even a fixed right. Else why did he allude to the delay in their application? Certainly a delay of seventeen months would not forfeit a right which had become vested within the meaning of the law. Vested rights are not thus easily taken away. More significant still is the fact that upon hearing a new trial was refused in this case, because it appeared from the minutes of the presiding judge that there was no error in ordering a verdict for the defendant Norman. This result could not have been reached if the Court had considered that the plaintiffs were entitled to a new trial as a matter of right at all, for in that case the question of misdirection would have been entirely immaterial.

A little later, Chief Justice WILDE himself, left *Benett* v. *Steam Boat Co.*, 16 C. B. 29, in the same plight, and a new trial was granted,—apparently on the authority of *Newton* v. *Boodle*,—but there is nothing in the case to aid us here. The rule thus established has been generally followed in this country as is shown in the opinion in *Nelson* v. *Marshall*,

supra, and in *State* v. *Weiskittle,* 61 Md. 51, there cited, this significant language is used: "It is the established practice, both in England and this State" to grant new trials under these circumstances. This language indicates pretty clearly that the Maryland Court did not regard the right as a vested one, but rather as a rule of practice, merely. And this, we think, is the logic of it. The procurement of a bill of exceptions, with a proper signature, for the consideration of this Court, is one of the steps in the orderly progress of the case to its final determination. A statute which extends the means or opportunity of obtaining such a bill is remedial in its character and should be liberally construed. It extends rather than restricts the plaintiff's rights. It affects the remedy only, it is not repugnant to the statute, and it does not disturb a vested right, for there is no such thing as a vested right in a particular procedure. Endl. Interp. St. § 285; *Lee* v. *Buckheit,* 49 Wis. 54.

In reaching this conclusion we have not overlooked *People* v. *Judge,* 40 Mich. 630, where a contrary result is arrived at on the precise question here presented, or *Yeatman* v. *Day,* 79 Ky. 186, which is in conflict with the views herein expressed. But notwithstanding these very respectable authorities to the contrary we hold that the provisions of the act of 1902 apply to this case, and that the court erred in denying the motion of the defendants and in granting that of the plaintiff.

Judgment reversed and cause remanded.

HARRY LAVALLEY *v.* BERNARDO RAVENNA.

October Term, 1904.

Present: ROWELL, C. J., MUNSON, START, WATSON, HASELTON, and POWERS, JJ.

Opinion filed November 2, 1905.

Conditional Sales—Nature of Condition—Destruction of Property Before Price Due—Effect—Evidence Treated as Admitted.

When it appears that in the trial of a case a certain written instrument, though not formally offered or received in evidence, was treated by the parties as properly in the case, this Court also will so treat it.

Assumpsit for goods sold and delivered, on condition that the title should not pass until full payment of the purchase price, may be maintained, although it appears that, without the fault of the buyer, the property was destroyed before the price fell due.

In such a contract, the buyer's promise to pay is not conditioned on the seller's ability to deliver the title.

GENERAL ASSUMPSIT for goods conditionally sold and delivered. Plea, the general issue. Trial by jury at the March Term, 1904, Rutland County, *Tyler,* J., presiding. Verdict and judgment for the plaintiff. The defendant excepted.

The plaintiff's evidence tended to show that he sold defendant a buggy, robe, harness and whip, and received therefor a horse, harness and wagon, and forty dollars, and the written contract mentioned in the opinion to secure the further sum of seventy-five dollars.

At the close of the evidence the defendant moved for a verdict upon the following grounds:

"First. The declaration is on the common counts and in the sale of goods an action cannot be maintained on the common counts, unless it appears that there has been a completed sale, and that the property has become vested in the defendant.

In this case there has been no completed sale, and the title has not vested in the defendant.

Second. That the contract proved is an executory contract, and that the action cannot be maintained on an executory contract, when the declaration is on the common counts.

Third. On the ground of a variance; the plaintiff has declared in common counts, and proved a conditional sale.

Fourth. The contract is an entire one, and plaintiff must prove full performance before he can maintain his action. He has not proved full performance because on account of the death of the horse he is unable to deliver the title.

Fifth. On the ground of failure of consideration. By the terms of the sale the title to the horse was reserved in the plaintiff, and it was his horse at the time it died, and the horse died before any of the payments called for by the contract came due. And for this reason, on account of the death of the horse, there was a failure of consideration before any of the payments came due on the contract."

The motion was overruled, and defendant excepted.

Marvelle C. Webber for the defendant.

The court erred in not directing a verdict for defendant. The horse having died before the payment became due, there is a failure of the consideration. Title was in the plaintiff when the horse died. *West* v. *Bolton,* 4 Vt. 558; *Shaw* v. *Peckett,* 26 Vt. 476; *Hurd* v. *Fleming,* 34 Vt. 170; *Arming-*

ton v. *Houston,* 38 Vt. 449; *Burrill* v. *Marvin,* 44 Vt. 277; *French* v. *Osmer,* 67 Vt. 427; *Ballard* v. *Burgett,* 40 N. Y. 314.

The plaintiff being the legal owner of the horse at the time it died, upon him must fall the loss. *Kein* v. *Tupper,* 52 N. Y. 550.

Failure of consideration, either in whole or in part, puts an end to an entire contract, and this was an entire contract. Story Cont., § 16; Benj. Sales, § 621; *Chanter* v. *Leese,* 5 M. & W. 698; *Judson* v. *Wass,* 11 Johns. 525; *Miner* v. *Braldey,* 22 Pick. 457; *Wright* v. *Barnes,* 14 Conn. 518.

Butler & Moloney for the plaintiff.

POWERS, J. This is an action of general assumpsit for the recovery of a balance due on the purchase of certain personal property. The parties disagreed somewhat in regard to the precise terms of the contract, but it satisfactorily appears from the record that the plaintiff sold and delivered to the defendant a team consisting of a horse, buggy and harness, receiving in part payment therefor another horse, harness and wagon, and a certain sum of money, and taking as security for the unpaid balance of the price agreed upon a written lien on all the property so conveyed to the defendant. Soon after, and before any part of such unpaid balance came due, the horse covered by the lien died without the fault of the purchaser. The seller waited until the full amount of such balance fell due by the terms of the contract, and then brought this suit for its recovery. At the close of the evidence the defendant moved for a verdict on several grounds, which was overruled, to which he excepted.

It appears from the record that the written lien was not formally offered or received in evidence, but it was submitted

to the jury and used by the court as though it was a part of the case; so we treat it as the parties treated it at the trial, and regard it as properly a part of the record. It is informal and crude, but the substantial recitals of it are that the property in question was conditionally sold and delivered to the defendant; that the title thereto was to remain in the plaintiff until the sums therein named were fully paid; that the plaintiff might repossess himself of the property on the defendant's default of payment, and that in such event all payments theretofore made by the defendant should be forfeited. Both parties signed the instrument, but it did not contain a note or other express agreement on the part of the defendant to pay the sum specified.

So the question presented, stated broadly, is this: Can there be a recovery for property sold and delivered on condition that the title shall not pass until full payment therefor has been made, when without the fault of the purchaser the property is destroyed before the price falls due? This question we answer in the affirmative. It is true that these contracts are sometimes spoken of as "executory," and the purchaser is termed a "bailee," as was done by this Court in *French* v. *Osmer*, 67 Vt. 427, 32 Atl. 254, but these expressions have reference to the strict legal title to the property, and should not determine the present question which is one pertaining to an absolute promise to pay. And the defendant's promise to pay was absolute, and was made upon a sufficient consideration; for he got just what he bargained for—the use, possession and enjoyment of the property with the right to acquire the absolute title upon payment of the stipulated price; and this was the consideration for his promise. The seller had done all that he was to do to or with the property by the terms of the contract,—all that he was to do at all, except

to receive the price. And upon that, the title passed without further action on the part of either party. The defendant's promise was in no sense conditioned on the seller's ability to deliver the title. He could not return the property to the seller and thereby avoid further liability. *Appleton* v. *Library Corp.*, 53 Conn. 4; *Smith* v. *Aldrich*, 180 Mass. 367.

The authorities are not in harmony on the question herein decided. *Tufts* v. *Griffin*, (N. C.) 10 L. R. A. 526, *Soda Fountain* v. *Vaughn*, (N. J.) 55 Atl. 54, *Burnley* v. *Tufts*, 66 Miss. 49, *Tufts* v. *Wynne & Thompson*, 45 Mo. App. 42, *Cooper* v. *Organ Co.*, 58 Ill. App. 248; *Hintermister* v. *Lane*, 27 Hun. 497, are among the cases in full accord with the views herein expressed. While to the contrary are *Bishop* v. *Minderhout & Nichols*, (Ala.) 52 L. R. A. 395, *Cobb* v. *Tufts*, 2 Tex. App. C. C. § 153, *Swallow* v. *Emery*, 111 Mass. 356.

The result is that we hold that the defendant is liable for the unpaid balance, notwithstanding the death of the horse included in the sale.

Judgment affirmed.

STATE v. CHARLES WILLETT.

October Term, 1904.

Present: ROWELL, C. J., MUNSON, START, WATSON, HASELTON, and POWERS, JJ.

Opinion filed November 3, 1905.

Statutory Rape—Evidence—Other Sexual Acts—Election—Complaint of Prosecutrix—Improper Answer to Proper Question—Alibi.

In a prosecution for statutory rape, no date given by the State's Attorney in his opening statement can make the one alleged in the information an impossible date.

In a prosecution for statutory rape, it was not error to allow the State to introduce evidence of sexual intercourse had on different days, and to refuse to require it to elect the occasion on which it would rely till the close of its case.

In such case, the matter of election is, ordinarily, within the discretion of the trial court, and no exception lies to its action thereon, provided an election is compelled before the respondent is called upon for his defence.

In a prosecution for statutory rape, a witness called by the State to prove a complaint by the girl, after having been cautioned not to name the person complained of, was asked to state the nature of the complaint, and answered, "She said he had insulted her." The witness was then asked what she said had been done to her, and answered, "She did not say, only that is the way she said it." The answers were objected to on the ground that they named the respondent. *Held*, that the State was without fault, and the case should not be reversed.

In a criminal prosecution, time need not be proved as alleged, unless it is descriptive of the offence.

In a prosecution for statutory rape, it appeared that the girl was at respondent's house during four weeks in August. She testified to five or six occasions during the second and third week of her stay there, without undertaking to fix the dates. The State elected to stand upon the last occasion, but it was not required to fix the date. On cross-examination, the girl fixed a certain day in the

last week of her stay at respondent's house as the last occasion, and respondent's evidence tended to show an alibi covering this day. *Held*, that it was not error to refuse respondent's request to charge that, if he had established his alibi covering the date named, he was entitled to an acquittal; and that it was rightly left to the jury to say whether the girl was able to fix the exact dates from memory.

INFORMATION for statutory rape. Plea, not guilty. Trial by jury at the September Term, 1903, Chittenden County, *Tyler*, J., presiding. Verdict, guilty; judgment thereon. The respondent excepted.

H. S. Peck and *J. J. Enright* for the respondent.

It was error to allow the witness to state that the prosecutrix complained of the respondent. The witness might just as well have said "Charles Willett," instead of using the pronoun. *State* v. *Niles*, 47 Vt. 85; *State* v. *Carroll*, 67 Vt. 497.

M. G. Leary, State's Attorney, for the State.

MUNSON, J. The information charged an offence on the ninth day of September, and the State's Attorney said in his opening statement that he expected to prove an offence in August. The respondent thereupon moved that the information be quashed, on the ground that it alleged an impossible date. It is certain that no statement of a time other than the one alleged could make the one alleged an impossible date under the rules of pleading. The motion was properly overruled.

The court permitted the State to introduce evidence of intercourse had on different days, as the basis of an election, and refused to require the State to select the occasion on which it would rely until the close of its case; to all of which exception was taken. The admission of evidence covering

several occasions was not error, if upon an election being made the evidence relating to other occasions bore upon the issue as finally submitted. In a prosecution for adultery, evidence of other acts of adultery occurring both before and after the one charged, is admissible. *State* v. *Bridgman,* 49 Vt. 202. The same rule must be applicable in a prosecution for statutory rape. So the evidence of the several acts was properly in the case. The matter of election is ordinarily within the discretion of the court, and it is clear that no exception will lie to the action of the court if an election is compelled before the respondent is called upon for his defence. 1 Bish. New Cr. Proc. § 461, 5; *State* v. *Smith,* 22 Vt. 74.

In undertaking to prove a complaint the State's Attorney asked in regard to the nature of it, cautioning the witness not to name the person complained of; and the witness replied, "She said he had insulted her." The witness was then asked, "What did she say had been done to her?" and replied, "She did not say, only that is the way she said it. She said he had insulted her." The answers were objected to on the ground that in effect they named the respondent, and exceptions were noted. We do not think the case should be reversed because of these answers. The State was without fault. The question was proper, and the witness carefully cautioned. The witness evidently tried to answer properly. The frame of the answer was such that a successful interruption was impossible. The answer itself did not name the respondent. It could have that effect only because the respondent was on trial and had been testified about. The propriety of allowing an exception in these circumstances has been questioned. The court would at once have instructed the jury as to the proper use of the answer upon a suggestion from respondent's counsel. This removal of the matter from the minds of the jury as far as it can be done, is all that the respondent is ordinarily entitled

to in such instances. The views of the Court upon this subject may be gathered from *Houston* v. *Russell,* 52 Vt. 110, 117; *Frary* v. *Gusha,* 59 Vt. 257, 9 Atl. 549; *Lawrence* v. *Graves' Estate,* 60 Vt. 657, 15 Atl. 342.

The respondent moved for a verdict on the ground of a variance between allegation and proof as to the time when the offence was committed. The motion was properly overruled; for unless descriptive of the offence the time need not be proved as laid. 1 Bish. New Cr. Proc. 386.

The prosecutrix was at the respondent's house during the four weeks in August. It appears from a short extract of her testimony, incorporated into the exceptions for another purpose, that she testified that the first occasion was after she had been there about two weeks. The exceptions show that the State's evidence tended to establish five or six occasions during the last two weeks in August. The respondent's requests assumed that she fixed the first occasion as occurring on Thursday or Friday of the second week, which would be the 13th or 14th, and the last occasion as occurring on Thursday or Friday of the last week, which would be August 27 or 28. It appears from the charge, which is referred to on the points made by the requests, that she testified to five or six occasions during the second and third weeks, but without undertaking to fix the days of the week or month, and testified further that nothing occurred during the first week or the last. The charge goes on to say that she did fix some days in cross-examination, and left it for the jury to say whether she was able to fix the days of the week or the month from memory, or was led to give them by the cross-examination. The State elected to stand upon the last occasion testified to, but was not required to name the day. It appears from the charge that the respondent gave evidence tending to establish an alibi covering the occasions testified to, and the court was requested

to charge that if the respondent had established his absence during Thursday and Friday, August 27 and 28, he was entitled to an acquittal. The court declined to give this effect to the prosecutrix's answers fixing the day, but left it for the jury to determine whether the State had shown beyond a reasonable doubt that the respondent was where he had the opportunity to commit the offence on the last occasion testified to; saying further that it was not necessary for them to find the date. The respondent was not entitled to have the question restricted as claimed. The alibi was not a special issue to be separately disposed of upon a consideration of the evidence bearing solely upon the dates. The question for the jury was whether upon a consideration of the whole evidence they were satisfied of the respondent's guilt beyond a reasonable doubt.

Judgment that there is no error in the proceedings, and that the respondent take nothing by his exceptions.

There is also a petition for a new trial. Upon respondent's motion, the evidence of a witness for the State whom he was deprived of the opportunity to cross-examine, is excluded from consideration. The petition is based upon a retraction of the complaining witness, the only witness to the occurrences in question; who now testifies that the story she told on the trial was a fabrication, which she was instructed to tell by her grandmother, and told through fear of punishment. This is contradicted by the testimony of the grandmother. The circumstances in which the retraction was originally made are fully presented in the evidence taken, but it is not necessary to recite them. Upon a careful review of the whole case, a majority of the Court are satisfied that the respondent was justly convicted.

Petition dismissed.

STATE v. HIMAN KRINSKI.

January Term, 1905.

Present: ROWELL, C. J., MUNSON, WATSON, HASELTON, and POWERS, JJ.

Opinion filed November 3, 1905.

Intoxicating Liquors—Keeping for Illegal Sale—Evidence—Illegal Search Warrant—Jamaica Ginger—No. 90, Acts 1902.

In a prosecution for keeping intoxicating liquor for sale without a license, certain articles found on respondent's premises, and which tended to establish his guilt, were admissible in evidence against him, although they were seized and taken from his possession by virtue of an illegal search warrant.

There is a plain distinction between the seizure and production in evidence of articles which are not the basis of the charge and are merely of an evidentiary character, and the seizure and production in evidence of property kept for an illegal use.

In a prosecution for keeping intoxicating liquor for sale without a license, the State is not confined to evidence of the liquor in respect of which it claims a conviction, but may show that other liquors were kept in the same place.

In a prosecution for keeping intoxicating liquor for sale without a license, it was proper to allow the State to show, as characterizing the place and business, that upon the occasion of a search of respondent's store, while two intoxicated men were wrangling over a bottle of soda-water, the respondent came into the room.

In a prosecution for keeping intoxicating liquor for sale without a license, it appeared that several small flask-shaped bottles of Jamaica ginger were found in respondent's store, and that 300 empty bottles of the same kind were found in an adjoining back room. *Held*, that it was not error to permit a witness for the State, concerning whose competency no question appears to have been raised, to testify that he never saw such bottles used in a proper pharmacy, and that glass manufacturers catalogued what they call a "ginger bottle," of a different shape and size.

In a prosecution for keeping intoxicating liquor for sale without a license, the State relied upon a certain preparation of Jamaica

ginger, which respondent claimed that he kept for sale as a medicine only. *Held*, that the instruction, "If this preparation * * * * is a beverage, which is capable of producing intoxication, and may be used for that purpose, then it is prohibited," when considered in connection with the rest of the charge, could not have harmed the respondent.

Although a liquid which contains more than one per cent. of alcohol was manufactured for a lawful purpose, and its sale as a medicine is lawful, yet, when sold as an intoxicating beverage, it is "intoxicating liquor," within the meaning of No. 90, Acts 1902.

No. 90, Acts 1902, does not exclude from the term "intoxicating liquor" medicinal preparations, fluid extracts, and toilet articles of which alcohol is the solvent principle.

COMPLAINT, by a License Commissioner of the town of West Rutland, for keeping and exposing for sale intoxicating liquor without a license, in violation of No. 90, Acts 1902. Plea, not guilty. Trial by jury at the March Term, 1904, Rutland County, *Tyler*, J., presiding. Verdict, guilty; and judgment thereon. The respondent excepted.

The respondent excepted to the failure of the court to charge as requested in his nine requests, which are as follows:

"First: That the jury be instructed that the respondent cannot be convicted of keeping for illegal sale the Jamaica ginger in question, unless the jury is satisfied by the requisite measure of proof that the substance is a beverage.

Second: In order to constitute this substance a beverage, the jury must find that it is such a substance as would ordinarily be drunk for the purpose of its alcoholic and intoxicating effects and not one that is ordinarily and commonly used for legitimate medicinal or culinary purposes.

Third: The fact that this substance contains more than 1 per cent. of alcohol does not make it intoxicating liquor within the meaning of the statute. The statute does not undertake to prohibit the use and sale of medicines or household remedies, nor of articles designed for household use,

such as cooking, even although they contain more than 1 per cent. of alcohol.

If the view expressed in the first and second requests is not entirely adopted by the court, the respondent further requests that the jury be instructed as follows:

Fourth: If the substance in question is really made in good faith, and sold and used as a medicine, then it is not a beverage within the meaning of the law, and the fact that it is extensively sold by grocers and druggists as such medicine, and has the medicinal effects claimed as the evidence of the respondent tends to show, are legitimate matters for the consideration of the jury in the determination of this question.

Fifth: The burden is upon the prosecution to prove that the substance is in fact a beverage, and that the defendant did not intend to sell it in the way in which he legitimately might, and unless these facts are established beyond a reasonable doubt by the evidence in this case, the verdict should be acquittal.

Sixth: The presumption of law is that this substance purporting to be Jamaica ginger and a medicine is what it purports to be, and unless this presumption is overcome by the evidence in the case, and the contrary established by the requisite measure of proof above indicated, it should not be taken to be a beverage or intoxicating liquor within the meaning of the statute.

Seventh: Even although this medicine is not of the strength and does not contain the proportions of alcohol and other ingredients required by the so-called 'standard,' yet if it is honestly and in good faith prepared and sold as a medicine, the fact that it is not up to *standard* does not change its character as such.

Eighth: Even although the jury should think that as a medicine it was not the most efficacious, nor as good a remedy

as a physician's prescription or some other remedy for a given ailment, that fact would not alter its character nor justify a finding that it is intoxicating liquor within the meaning of the statute.

Ninth: The jury are not at liberty to consider, nor to be governed by, any evidence whatever except the evidence in the case given in court, whether bearing upon the purposes or use to which the substance in question was to be put by the respondent, or the character of the substance itself, or the likelihood or possibility of its being used as a beverage. The only evidence upon any of these subjects that the jury should consider and weigh is the evidence given in court."

Butler & Moloney for the respondent.

Respondent's fourth request is in the exact language of *Russell* v. *Sloane,* 33 Vt. 659.

R. A. Lawrence, State's Attorney, for the State.

The officers were competent to testify as to what they found in respondent's store, regardless of the legality of the search warrant. 12 Cyc. 402; *State* v. *Mathers,* 64 Vt. 101; *Com.* v. *Dana,* 2 Met. 337.

MUNSON, J. The respondent objected to the production of the articles found in his building, and testimony relating thereto, on the ground that the search in which the articles were seized was made upon an illegal warrant. The court held the evidence admissible, without regard to the legality of the warrant; and this was correct. *Adams* v. *New York,* 192 U. S. 585, 48 Law ed. 575. The respondent relies upon *State* v. *Slamon,* 73 Vt. 212, and *Boyd* v. *United States,* 116 U. S. 616, 29 Law ed. 746; but these cases, however regarded,

are not controlling. There is a plain distinction between the seizure and production of papers which are not the basis of the charge and are merely of an evidentiary character, and the seizure and production of property kept for an illegal use.

The respondent objected to evidence regarding the Jamaica ginger, on the ground that evidence had already been introduced regarding the finding of some alcohol. The State was not bound to confine its evidence to the liquor for which it claimed a conviction. The finding of other liquors in the same place would bear upon the question whether the kind relied upon was kept for illegal sale.

The State was permitted to show that at the time of the search two men, under the influence of liquor, were wrangling over a bottle, during which wrangling the respondent came into the room. It appeared further that this bottle was seized, and afterwards found to contain only soda-water. This evidence was admissible as one of the circumstances of the search and seizure, and as tending to characterize the place and business.

The bottles purporting to contain Jamaica ginger were small, flat, flask-shaped bottles, and there was evidence that the officer found nearly 300 empty bottles of the same kind in the back room of the store. Dr. Wiltse, the state chemist, testified to the differences between the article seized and the standard Jamaica ginger, and stated further that there was a standard form of bottle put in the glass manufacturers' catalogues for putting up the medicinal Jamaica ginger, and that he had never seen it put up in bottles of the shape of those put in evidence. He was also permitted to testify under respondent's exception that he never saw a bottle of the style and shape of these bottles used in a proper pharmacy, and that glass manufacturers put in their catalogues what they call a "ginger bottle," of a different shape and style. It does not

appear that any question was raised as to the witness' competency to testify upon this subject, and we think the matters testified to had a legitimate tendency to sustain the charge.

The respondent submitted several requests as to what constitutes a beverage, and excepted to the court's refusal to comply therewith, and to its charge upon that subject; and now argues that the court erred in saying: "If this preparation * * is a beverage that is capable of producing intoxication, and may be used for that purpose, then it is prohibited." But this sentence must be considered in connection with other parts of the charge. The court first took up the question whether this Jamaica ginger was a beverage within the meaning of the law. And in considering this question, after referring to the evidence in respect to its being used as a beverage, the court said, in substance, that the law did not mean that it must be classed among liquors that are ordinarily used as beverages, but that it is sufficient if the liquid is one that can practically be used as a beverage, and be drunk for the purpose of intoxication; that if the preparation was a beverage capable of producing intoxication, and one that could be used for that purpose, then it fell within the list of intoxicating liquors, and the sale or keeping for sale was prohibited. The evident meaning of this is that a preparation of this kind may in some circumstances be classed with intoxicating liquors, and so come within the prohibition, although not ordinarily used as a beverage; and the remainder of the charge makes it certain that it must have been so understood by the jury. For the court then proceeds to consider the purpose for which this article was kept; and states the claim of the respondent to be that he kept it to sell for medicinal purposes, and not to sell as a beverage; and declares it to be the leading question in the case whether the respondent kept it with intent to sell it as a beverage; and directs the attention of the jury to the

evidence upon one side and the other bearing upon that point. The court said further that if they found the respondent had made sales of this preparation to be used as a beverage for the purpose of intoxication, that would be a circumstance tending to show that the stock on hand was designed for the same purpose. Later, the court concluded a restatement of the case in these words: "The important inquiry, I repeat, is, was it kept for the purpose of sale—with intent to sell it as a beverage." It is clear that the respondent was not harmed by the sentence complained of, if the court was right in holding that the liquid in question could be made a beverage under the law then existing.

The respondent insists that it is the manifest purpose of the act of 1902 to exclude from the term "intoxicating liquor" all medicinal preparations, fluid extracts, and toilet articles, of which alcohol is the solvent principle, even though they contain more than one per cent. of alcohol. We think the act was not intended to effect any change of the law in this respect, and that *State* v. *Kezer,* 74 Vt. 50, is still applicable, as regards the purpose of the keeping or sale.

Judgment that there is no error in the proceedings, and that the respondent take nothing by his exceptions.

LYNDON SAVINGS BANK *v.* INTERNATIONAL COMPANY, ET AL.

May Term, 1905.

Present: ROWELL, C. J., TYLER, START, WATSON, HASELTON, and POWERS, JJ.

Opinion filed November 9, 1905.

Promissory Notes—Indorsement by Stranger—Effect—Consideration—Extension of Payment—Corporations—Estoppel—Statute of Limitations—Waiver—Savings Banks—V. S. 4099.

One who however long after its execution, puts his signature in blank upon the back of a promissory note which he does not own, assumes, *prima facie*, the obligation of a maker.

It is for the jury to weigh the evidence and this Court cannot disturb a verdict which the evidence, however conflicting, tends to support.

The sufficiency of the consideration of a contract does not necessarily depend upon whether the thing promised results in a benefit to the promisee, or in a detriment to the promisor. It is enough that something is promised, or the exercise of a present right is forborne.

The promise by the owner of a promissory note to extend the time of its payment is a sufficient consideration to support the contract made by defendants by signing their names on the back thereof.

One of the makers of a demand promissory note having become insolvent, plaintiff's agent told defendants that if they would fix the note so that it would be lawful and safe in the judgment of plaintiff, that it could run as long as the interest was kept paid and plaintiff considered the security good. Whereupon defendants placed their signatures upon the back of the note. *Held*, in a suit based on said indorsement, that the fact that plaintiff, without objection, continued to hold the note and to receive the interest thereon semi-annually for years after defendants so indorsed it, shows that plaintiff had accepted the security of defendants' said indorsement, and that defendants must have so understood it.

When certain officers of a corporation, without authority to do so, agreed with the owner of its promissory note for an extension of the time of payment, in consideration of their indorsing their names thereon, and the corporation received the benefit of the forbearance, and paid the interest on the note for five years after the agreement for said extension was made, the corporation is estopped from denying the authority of its officers to make said agreement for extension.

When the owner of a promissory note, reserving his right to proceed against the "indorsers"—who are really joint makers—agrees with another maker thereof to receive and apply on the note dividends from property assigned by the latter for the benefit of creditors, and does so receive and apply such dividends, such indorsers are not thereby discharged from the payment of the balance due on said note.

The makers of a promissory note are bound by the provision therein waiving the Statute of Limitations.

In an action on a promissory note payable on demand, it appeared that certain defendants placed their signatures on the back of the note several years after it was given, and the jury found that they did so as "joint makers," in consideration of an extension of the time of payment; that no definite time was agreed upon, but that a reasonable time for such delay was "until plaintiff was dissatisfied with the security—until payment was demanded or offered." *Held*, that these findings did not make the note, in respect of said defendants, payable on demand, so as to start the Statute of Limitations from the date of their said indorsement.

An agreement by a savings bank, to extend the time of payment on a note until the bank should become dissatisfied with the security and call for payment, is not in violation of V. S. 4099, which provides that a savings bank shall not extend the time of payment for a loan on personal security for a longer time than one year.

SPECIAL ASSUMPSIT on a promissory note. The defendants severed in their defence, and each pleaded the general issue, with notice; Statute of Limitations; discharge of the International Company by plaintiff, and payment. Replications; similiter to first plea; waiver, or estoppel, to second; traverse of third. Rejoinders by Prouty and Miller: traverse to second replication; similiter to third. Rejoinder by Inter-

national Company: Demurrer to second replication; similiter to third. Trial by jury at the June Term, 1904, Caledonia County, *Watson,* J., presiding. Special verdicts; no general verdict. Judgment against International Company and O. C. Miller for amount of note. The International Company and O. C. Miller excepted. Judgment that G. H. Prouty recover his costs. Plaintiff excepted to the judgment in favor of G. H. Prouty.

The International Company is a corporation organized under the laws of this State. The writ in this case is dated March 7, 1901, and was served March 11, 1901. The note in suit is for $5,000.00, dated June 12, 1886, payable to plaintiff, or order, on demand with interest semi-annually, and waiving "all right or claim to the Statute of Limitations," and signed

"INTERNATIONAL CO.
J. A. PROUTY, Pres.
H. E. FOLSOM, Treas."

Upon the back appears: "Waiving demand and notice,
H. E. FOLSOM,
O. C. MILLER,
G. H. PROUTY."

The interest was paid by the International Company, semi-annually, down to July 1, 1898. J. A. Prouty died before this suit was brought and so is not a party. H. E. Folsom pleaded his discharge in insolvency, and a non-suit was entered as to him. He was adjudged an insolvent in the fall of 1893. On December 19, 1893, and after Folsom had been adjudged an insolvent, plaintiff sent its agent, L. B. Harris, to Newport, Vt., to see G. H. Prouty—who is a son of J. A. Prouty and was then a director of the International Company —and O. C. Miller about doing something in respect of the

note in suit. After an interview with said Harris, O. C. Miller and G. H. Prouty wrote their names on the back of said note, at Newport, Vt., on December 19, 1893. O. C. Miller was the manager of the International Company from 1886 to September 30, 1898. In the fall of 1898, the International Company became financially embarrassed; and O. C. Miller wrote to each creditor of the Company, including the plaintiff, a letter dated September 22, 1898, signed by him as manager, stating that the International Company was insolvent, and calling a meeting of the creditors at the office of the Company on September 30, 1898. The letter sent to plaintiff also stated: "Although you have good backers on your note, if convenient should like to have you present at the meeting."

Said meeting of the creditors was held September 30, 1898. At said meeting, the creditors elected a committee of three, whom they directed to take charge of the assets of the Company, realize upon the same, and divide the proceeds *pro rata* among the creditors of the Company. J. W. Copeland, who was a trustee and the Vice-President of the plaintiff, was present at said meeting, but did not vote. Before any vote was taken he said to the meeting that he was there as the representative of the plaintiff to note the proceedings of the meeting and report to plaintiff's trustees, and that he was without instructions, and should not vote. He reported the action of said meeting to the plaintiff.

The stockholders of the International Company, at a meeting duly warned and held for that purpose on October 1, 1898, voted that "the Company is insolvent," and that its assets be realized upon and disposed of as directed by said creditors' meeting. The evidence of defendants tended to show that thereafterwards the International Company delivered to said creditors' committee all its assets; and that each creditor, except the plaintiff, executed and delivered to the In-

ternational Company a writing agreeing to accept in *settlement* of their claims such sums as might be their due, *pro rata,* from the proceeds realized by said creditors' committee from the assets of the Company.

It appeared from the records of the plaintiff that on October 3, 1898, the plaintiff's trustees voted: "To give the assent of the Lyndon Savings Bank to the proposition that the property of the International Company be put into the hands of trustees to be sold to the best advantage, and the proceeds to be divided between the creditors *pro rata,* the bank reserving all rights to collect its debt from the indorsers of the note." It appeared that on October 15, 1898, plaintiff, by its treasurer, wrote a letter to the International Company, which was received by O. C. Miller in due course of mail, and which gave notice of said vote of plaintiff's trustees. Defendants' evidence tended to show that about October 1, 1898, the International Company surrendered all of its assets to said creditors' committee, who thereafter converted the same into cash, and paid from the proceeds thereof to the creditors, including plaintiff, a dividend of ten per cent. on each of the following dates: November, 1898; March, 1899; June, 1900; November, 1900; and a dividend of five per cent. on each of the following dates: May, 1901; August, 1901; December, 1902; and September, 1903; that each ten per cent. dividend so paid plaintiff was $507.50; and each five per cent. dividend so paid plaintiff was $253.75. There was no evidence tending to show that O. C. Miller ever paid anything on the note in suit. There was no evidence, except said letter dated September 22, 1898, tending to show that O. C. Miller had in any way, since he wrote his name on the back of said note on December 19, 1893, acknowledged any personal liability on said note, or promised to pay it. Only special verdicts were submitted, and in answer to

these the jury found that G. H. Prouty and O. C. Miller were makers; that an agreement was made at Newport, Vt., on December 19, 1893, between plaintiff and the International Company for an extension of the time of payment of the note in suit "until plaintiff is dissatisfied with security"; that on December 19, 1893, plaintiff agreed with O. C. Miller and G. H. Prouty that the time of payment on the note in suit should be extended, if said Prouty and Miller wrote their names on the back of said note, but that no particular time for the payment of the note was stated; that a reasonable time for the payment of said note after said agreement was made was "until payment was demanded or offered"; that it was "doubtful" whether the note could have been collected of the International Company at any time from December 19, 1893, to January 1, 1898; that O. C. Miller and G. H. Prouty were not damaged by plaintiff's omission to collect the note in suit from December 19, 1893, to January 1, 1898; that after October 1, 1898, the committee appointed by the creditors of the International Company managed and disposed of the property of said Company, and paid from the proceeds thereof the dividends which were paid to the creditors; that the plaintiff by its conduct with reference to the property of the International Company, and by accepting the dividends from the committee of the creditors of said Company, did not discharge said Company from further liability; that O. C. Miller and G. H. Prouty did not sign their names on the back of the note in suit in consideration that the plaintiff would not prove that note against H. E. Folsom's insolvent estate, unless compelled by law to so do.

Cook & Norton, and *W. W. Miles* for the plaintiff.

The fact that Miller and Prouty signed the note shows, *prima facie,* that they are joint makers. *Barrows* v. *Lane and Benham,* 5 Vt. 161; *Knapp* v. *Parker,* 6 Vt. 642; *Flint* v. *Day,* 9 Vt. 345; *Nash* v. *Skinner,* 12 Vt. 219; *Strong* v. *Riker,* 16 Vt. 554; *Sylvester* v. *Downer,* 20 Vt. 355; *Bank* v. *Marble Co.,* 61 Vt. 106; *Ballard* v. *Burton,* 64 Vt. 387; *Brooks* v. *Thatcher,* 49 Vt. 492; *Brooks* v. *Thatcher,* 52 Vt. 559; *Lyndon Savings Bank v. Int. Co. et al.,* 75 Vt. 224.

The general manager of a corporation has the power to borrow money to meet corporate expenses. Cook Corp. (4th ed.) § 719; *Rosemond* v. *Northwestern, etc. Co.,* 62 Minn. 374.

An agreement to forbear for an indefinite time is a sufficient consideration for indorsing the note. *Bullard* v. *Benton,* 64 Vt. 387; *Cit. Sav. Bank* v. *Babbitt's Est.,* 71 Vt. 182; *Eltyng* v. *Vanderlyn,* 4 Johns. 237; Fell on Guaranty & Suretyship, 29 (N. 1); *King* v. *Upton,* 4 Me. 387; *Howe* v. *Taggart,* 132 Mass. 284; *Elton* v. *Johnson,* 16 Conn. 253; *Prouty* v. *Wilson,* 123 Mass. 297; *Robinson* v. *Gould,* 11 Cush. 55; *Moore* v. *McKenney,* 83 Me. 80 (21 Atl. Rep. 749); *Calkins* v. *Chandler,* 36 Mich. 320 (24 Am. Rep. 593); *Hakes et al.* v. *Hotchkiss,* 23 Vt. 231.

Neither the corporation nor Prouty, nor Miller can raise the question of want of authority to make said contract for forbearance. Cook, Corp. (4th ed.) Par. 761; Cook, Corp. (4th ed.) 287, § 140; *Middlebury College* v. *Williamson,* 1 Vt. 212; *Newell* v. *Herbert,* 2 Vt. 351; *Gray* v. *Otis,* 11 Vt. 628; *Windham Prov. Inst.* v. *Sprague's Est.,* 43 Vt. 502; *Bank of Orleans* v. *Fassett,* 42 Vt. 432; *Ladd* v. *Lord,* 36 Vt. 194.

Defendants, having agreed that they would not plead the Statute of Limitations, are estopped from doing so. *Trust Co.* v. *Sheldon et al.,* 68 Vt. 259; *Stearns* v. *Stevens,* 32 Vt.

678; *Ins. Co.* v. *Bloodgood,* 4 Wend. 652; *Paddock* v. *Colby,* 18 Vt. 485; *Benton* v. *Stevens,* 24 Vt. 131; *Randon* v. *Toby,* 11 How. 493; *Gay's Est.* v. *Hassom,* 64 Vt. 495.

A discharge of the principal debtor by his creditor will not release the surety, if the creditor reserves in the discharge the right to proceed against the surety. *Close* v. *Close,* 4 De G. M. & G. 176; *Wyke* v. *Rogers,* 1 De G. M. & G. 408; *Ville* v. *Hoag,* 24 Vt. 46; *Mayhew* v. *Crecket,* 2 Swanst. 185; *Boultbee* v. *Stubbs,* 18 Ves. Jr. 20; *Rees* v. *Berrington,* Vol. II, part 2, L. C. Eq. Marg. p. 988 (4th ed.)

Young & Young for the defendant.

The plaintiff, by accepting dividends, *pro rata,* from the assets of the International Company, discharged that company, and thereby released the sureties. *Dauchy* v. *Goodrich,* 20 Vt. 127.

The findings of the jury make the note a demand note, as to Miller and Prouty. *Dawley* v. *Wheeler,* 52 Vt. 574; *Manter* v. *Churchill,* 127 Mass. 31; *Kingsbury* v. *Butler,* 4 Vt. 458.

In any event, the Statute of Limitations began to run, as to Prouty and Miller, not later than December 19, 1894. V. S. 4099; *Verder's Ex.* v. *Verder,* 63 Vt. 38; *Clark* v. *Snow,* 60 Vt. 205.

Miller's letter of September 22, 1898, was the act of the company, and not that of Miller. But the letter does not contain an acknowledgment sufficient to remove the statutory bar. *Prescott* v. *Vershire,* 63 Vt. 517; *Brayton* v. *Rockwell,* 41 Vt. 621; *Aldrich* v. *Morse,* 28 Vt. 642; *McCormick* v. *Brown,* 95 Am. Dec. 170; *Roscoe* v. *Hale,* 7 Gray 274, 19 Am. & Eng. Enc. 294; *Fort Scott* v. *Hickman,* 112 U. S. 150; *Ensign v. Batterson,* 68 Conn. 298; *O'Riley* v. *Finigan,* 58

Pac. Rep. 28; *Chambers* v. *Garland,* 3 Green (Iowa) 322; *Holberg et al.* v. *Jaffray & Co.,* 65 Miss. 526; *Keemer* v. *Zartman,* 144 Pa. St. 179; *Thomas* v. *Cary,* 26 Colo. 485.

TYLER, J. The note in controversy is described in the opinion in this case, reported in 75 Vt. 224, 54 Atl. 191. At the first trial in the county court a verdict was directed for the defendants, which action this Court held was error, reversed the judgment and remanded the case for a new trial. We then held that:

"What relation Miller and Prouty assumed to the note by placing their names upon it was a question of fact, and not of law. If they became joint makers, no demand was necessary and this action was properly brought against them. If they were indorsers, it could not be held, as matter of law, that they waived demand and notice by placing their names under the name of Folsom, who, when the note was executed, signed it as indorser, waiving demand and notice; and if there was an agreement or understanding between the parties that the time of payment should, in consideration of their signing the note, be forborne, there being no time of forbearance specified, it would mean, in law, a reasonable time. What constituted a reasonable time, in the circumstances, was a question of fact for the jury, and as against Miller and Prouty, the Statute of Limitations would begin to run at the expiration of such reasonable time." Quoting further from that opinion:

"And it has generally been held by this Court that one not before a party to the note, who signs his name upon the back of it, in blank, is *prima facie* a maker, and assumes the same obligations as if he wrote his name upon the face of the instrument. In *Sylvester* v. *Downer,* 20 Vt. 355, 49 Am. Dec. 786, the rule was extended and emphasized, for it is there declared that it makes no difference that the signing is

long after the making of the note and while it is in circulation, for the reason, as stated by Judge Redfield, that if the signer consents to be thus bound, and induces others to take the note under that expectation, he will be estopped to deny that fact and will be treated the same as if he had signed the note at its inception. It was, however, held in that case, that the indorsement being in blank, the real obligation intended to be assumed—whether that of maker, guarantor or indorser—might be shown by parol evidence. In *Bank* v. *Dorset Marble Co.*, 61 Vt. 106, 17 Atl. 42, this rule was recognized and reaffirmed."

At the last trial the jury found by special verdicts submitted to them, that Miller and Prouty, by placing their names upon the note, became joint makers thereof; that an agreement was made December 19, 1893, between the plaintiff and the International Company for an extension of the time of payment, but for no definite time, and that a reasonable time to delay its collection was: "Until the plaintiff was dissatisfied with the security." Another special finding was: "Until payment was demanded or offered." There were special findings that the International Company turned over to a committee all its assets to be divided *pro rata* among its creditors, that the committee paid over the dividends, and that the Company was not discharged from further liability.

The defendants, Miller and Prouty, objected and were allowed an exception to the submission to the jury of the question whether they signed the note as joint makers, and they claimed that there was no evidence that they were joint makers; they also excepted to the submission to the jury to find whether there was an extension of the time of payment of the note, and claimed that there was no evidence to sustain that finding.

The defendants contend that this action was barred by the Statute of Limitations; that no new promise or acknowledgment was shown, and that the note had not matured when the action was commenced.

The case shows that no agreement was made at the time the money was loaned and the note was given that either Miller or Prouty should ever become parties to the note, and it appears that neither of them received any security or indemnity for placing their names upon the back of it. Down to that time the note had remained as it was when made by the International Company, with Folsom as indorser. The plaintiff seeks to hold Miller and Prouty liable by reason of their placing their names upon the note and claims that they thereby became makers. The defendants claim that they became indorsers or guarantors. The general rule of law is found in the opinion of Redfield, J., in *Sylvester* v. *Downer*, (*supra*) "that he who writes his name upon the back of a note, if he were not before a party to it, assumes the same obligation as if he wrote his name upon the face of the instrument; and that, although he does this long after the making of the note, it shall make no difference." But the question of Miller and Prouty's liability is not to be determined by this rule of law, but by the agreement made between themselves and L. B. Harris, who went to see them and make an arrangement about the payment or an extension of the note.

It appeared that the note was overdue, that Folsom had been adjudged insolvent, that the plaintiff employed Harris to go to Newport and call upon Miller and Prouty "to do something about the note," and that as a result of the interview they wrote their names upon the instrument. The exceptions state that the evidence was very conflicting as to what was said between them, and it so appears by the record; but it is not the duty of this Court to reconcile the evidence. As there

was evidence tending to show that Miller and Prouty signed the note as makers, the submission of that question to the jury was not error. The weight that should be given to the testimony of the witnesses who testified upon this subject was a matter that rested with the jury. The testimony of Harris tended to show that after Folsom became insolvent the plaintiff sent him to see Miller and Prouty about the note; that he saw them at Newport and informed them that he came as a messenger from the plaintiff to collect the note, if collection could be made, and if not, to ascertain their wishes or obtain instruction about proving this, and another note which the plaintiff held, against Folsom's estate; that he told them that Folsom had said that they—the Proutys and Miller—were, practically, the Company; that if they would fix the note so it would be lawful, and safe in the judgment of the bank, it could run as long as they kept the interest paid and the bank considered the security good; that Miller and Prouty both said that the estate of Folsom should not be charged with the loan and that they would do anything that he, Harris, or the plaintiff required in respect to fixing the note so as to make it all right without Folsom's name, that they would put their names upon the note, and that they did so after Harris had taken a little time to make inquiry as to their financial responsibility and expressed his willingness to accept their names. This evidence brings the case within the rule in *Sylvester* v. *Downer*. Miller, Prouty and Folsom disputed the testimony of Harris, but it was for the jury to decide as to the weight of evidence, and this Court cannot disturb the verdict.

Upon the testimony of Harris the jury were warranted in finding that an agreement was made between the plaintiff and said Company for an extension of the time of payment, which was a sufficient consideration for Miller's and Prouty's acts in view of their interest in the Company. It is held that,

"Consideration does not necessarily depend upon whether the thing promised results in a benefit to the promisee, or a detriment to the promisor. It is enough that something is promised, or the exercise of a present right is forborne." *Ballard* v. *Burton,* 64 Vt. 387, 24 Atl. 769, and cases cited in the opinion.

The defendants contend that, upon the testimony of Harris, the alleged agreement made by him with Miller and Prouty was not operative until accepted by the plaintiff and approved by the Inspector of Finance. It may be presumed that Harris returned the note to the bank and that the bank officers were satisfied with the names upon it that Harris had obtained, for they continued to hold it for years thereafter without objection by them and apparently with the approval of the state official. They also received the interest upon it semi-annually down to July, 1898. Miller and Prouty might well have understood that the note had been accepted; that Miller did so understand it is shown by his note to the plaintiff written nearly five years later in which he said, "you have good backers on your note," which words must have referred to Mr. Prouty and himself.

The defendants also contend that the case shows no authority in Miller conferred upon him by the International Company to make the agreement through Harris with the plaintiff. It is true that no vote of the Company was produced by the plaintiff showing that such authority was given Miller, but it appeared from defendant Miller's testimony that he was the general manager of the Company at the time he signed his name to the note; that he held that position from 1886 until the fall of 1898, when all the assets of the Company were placed in the hands of a committee, converted into money and the proceeds distributed *pro rata* among the cred-

itors, the plaintiff reserving the right to proceed against the indorsers upon its note.

It is unnecessary to hold as an abstract legal proposition that, as general manager of the corporation, Miller had power to borrow money to meet corporate debts in due course of business. He testified that he had charge of the funds of the Company as general manager, and that it was his duty to pay a note when it came due, "or to look out for it." He evidently understood that he and Prouty had authority to sign this note, and the record shows no dissent by the other directors to his agreement for an extension; neither is there any evidence in the case that tends to contradict his testimony.

But assuming that Miller and Prouty had no authority to make the agreement, they and the Company received the benefit of the forbearance, and the Company ratified it by paying the interest upon the note for five years after the agreement was made. That the defendants were estopped from denying Miller and Prouty's authority was held in the former decision. *Grand Isle* v. *Kinney*, 70 Vt. 381, 41 Atl. 130, is an authority upon this point.

It was said in the former opinion that it could not be held as a matter of law that the vote taken by the plaintiff, and its receipts of dividends from the committee of the International Company, discharged the Company. The proposition of the Company to its creditors was that they should accept, *pro rata*, such amounts as should be received from the Company's assets in settlement of their respective claims. The plaintiff, by its resolution, assented to the proposition that the property be sold and the proceeds be divided among the creditors, with a reservation of the right to collect its debt from the indorsers of the note, and the Company, through its committee, acted upon this acceptance and subsequently paid dividends to the plaintiff with the other creditors. That the

plaintiff should receive its dividends, reserving the right to collect the remainder of its debt from Miller and Prouty, whom the jury have found were joint makers of the note, was a matter of contract between the International Company, through its committee, and the plaintiff. Miller and Prouty were evidently regarded by the plaintiff as responsible, and it is not presumable that it would have released them upon receiving what could be got from the Company's assets, which Miller had said in his notice to the creditors were insufficient to pay the debts in full. It is noticeable that the plaintiff's resolution omitted the word "settlement" which the committee's offer contained. There was no error in the refusal of the court to set aside the ninth special finding.

It is competent for the makers of a promissory note to stipulate therein that they will waive the Statute of Limitations. *Trust Co.* v. *Sheldon et al.*, 68 Vt. 259, 35 Atl. 177. The plaintiff contends that, as the jury have found that Miller and Prouty signed this note as joint makers, they became subject to the clause, "and agree to waive all right or claim to the Statute of Limitations." But it is unnecessary to decide this question, for the jury found that an agreement was made for an extension of the time of payment of the note; that no definite time was agreed upon, but that a reasonable time for such delay was, until the plaintiff was dissatisfied with the security—until payment was demanded or offered.

It cannot be maintained that these findings made this instrument a demand note in the ordinary legal meaning of the term, "payable on demand." The jury in effect found that a right of action did not accrue upon the note until the plaintiff was dissatisfied with the security and made an actual demand of payment, and this was the agreement according to Harris' testimony. *Stanton* v. *Stanton*, 37 Vt. 411; *Thrall*

v. *Mead*, 40 Vt. 540; *Smith* v. *Franklin*, 61 Vt. 385; *Ins. Co.* v. *Batchelder & Son*, 62 Vt. 148, 19 Atl. 982. The case shows that demand of payment was made of defendants Miller and Prouty on February 5 and February 19, 1901, and that the suit was brought March 7, 1901. The failure of the International Company in 1898 and the non-payment of interest after that were sufficient causes for the plaintiff's dissatisfaction with the security.

The finding of the jury, that an extension of time of payment was agreed upon by the parties, is inconsistent with the defendants' contention that the other finding should be construed to mean that the note was payable immediately after the agreement was made. According to the testimony of Harris the note was to run along indefinitely, if the interest was kept paid, the only limitation being the time when the plaintiff should become dissatisfied with the security and call for payment. When demand was made the plaintiff's cause of action accrued against Miller and Prouty. This answers the defendants' suggestion in the brief of counsel that the agreement was in violation of V. S. 4099, which provides that a savings bank shall not make a contract or agreement to loan or to extend the time of payment of a loan, on personal security, for a longer time than one year.

Upon the special findings judgment should have been rendered against both Miller and Prouty; *therefore the judgment for defendant Prouty is reversed; the judgment against the International Company and Miller is reversed, pro forma, and judgment is rendered for the plaintiff against the three defendants, with costs.*

ISRAEL GUILMONT'S ADMINISTRATOR *v.* CENTRAL VERMONT RAILWAY CO.

May Term, 1905.

Present: ROWELL, C. J., TYLER, MUNSON, START, WATSON, HASELTON, and POWERS, JJ.

Opinion filed November 9, 1905.

Negligence—Railroads—Crossings—Duty of Engineer—Contributory Negligence.

A locomotive engineer has the right to assume that a person, whom he sees approaching the track, will not drive upon it in front of the train; and he owes such person no duty till he sees, or ought to see, that he is about to drive upon the track.

A railroad company is not responsible for the death of a person who is killed by negligently driving in front of a moving train, when it appears that those in charge of the train were in their proper places, that the engineer, as soon as he saw deceased approaching the track, instantly shut off steam, applied the emergency brake, sounded the whistle, and did all he could to stop the train.

CASE for negligence. Plea, the general issue. Trial by jury at the March Term, 1904, Washington County, *Stafford*, J., presiding. Verdict and judgment for the plaintiff. The defendant excepted. No exception was taken to the charge. The opinion states the case.

Hunton & Stickney for the defendant.

F. L. Laird, M. M. Gordon, and *R. A. Hoar* for the plaintiff.

TYLER, J. This action is brought by the plaintiff, as administrator of the estate of Israel Guilmont, deceased, under the statute, to recover damages to the wife and next of kin,

on account of the death of the intestate, alleged to have been caused by the wrongful act of the defendant.

The defendant's train men were running a regular freight train of eleven cars, on its usual time, between Montpelier and Barre, at about thirty miles an hour. As the train approached a certain bridge the fireman put in a shovel full of coarse coal, the effect of which was to surround the engine with smoke. The distance from this bridge to a highway crossing, which the train was approaching, was about eight hundred feet. After the smoke cleared away so that the engineer could see ahead as far as the crossing, the distance to it was one hundred and fifty to two hundred feet. When the crossing came into view the engineer saw the intestate with a horse and sled ten to fifteen feet from the crossing, and then it was not apparent that he was about to cross. As soon as he was seen to approach the track the engineer put on the emergency brake and sounded the danger whistle, but it was too late to stop the train and avoid striking the intestate. He was struck and received injuries of which he soon died. It appeared that he had stopped a few minutes at the "Tabor House," which was opposite the crossing and about one hundred feet from it, and then, without taking reasonable precautions, drove to the railroad track and upon the crossing in front of the train.

The court held and instructed the jury, without exception by the plaintiff, that the intestate was guilty of contributory negligence; but the court further said to the jury, in substance, that the only question for their determination was, whether, after the defendant's servants saw or ought to have seen the intestate about to cross and in a position of peril, they neglected the reasonable means at their command which might have saved him from accident.

The exceptions leave no open question in respect to negligence by the defendant prior to the engineer's discovering

the intestate near the crossing. The only question submitted to the jury was in relation to what occurred after the train men saw or ought to have seen him about to cross, and whether they used all reasonable means to save him.

The case made by the plaintiff shows that as Guilmont approached the railroad track and when within twenty-five feet of it he looked up and down the track and then up the track a second time; that the track was plainly in sight and that he was acquainted with the locality; that the horse moved slowly but steadily forward (though to some witnesses he seemed to stop or hesitate for an instant before stepping upon the track), and passed over it unharmed. It also appeared that Guilmont and his sleigh had nearly cleared the track when they were struck by the engine. Guilmont was in full possession of the senses of sight and hearing when he undertook this perilous enterprise. The fact that he looked up and down the track before driving upon it, makes it probable that he hastily measured the distance between the train and the crossing and thought there was time for him to pass over the track before the train reached the crossing. Whether this was the case, or whether he was oblivious to the danger when he attempted to cross the track, the court correctly held him guilty of contributory negligence.

The crew of the train consisted of a conductor, an engineer, a fireman, a forward brakeman who was then upon the engine, and a rear brakeman who was upon the rear car. All these men were in their proper places on the train. The engineer testified, and his testimony was not disputed, that when the engine had passed through the bridge, and the smoke and steam had cleared away so that he could see to the crossing, he saw Guilmont within ten or fifteen feet of the track; that the horse seemed to stop an instant or two; that as soon as he saw him approaching the track he instantly shut off the

steam, applied the emergency brake and sounded the danger whistle; that he did all that he could do to stop the train; that he could not have stopped it more quickly, and that he did all that could have been done to prevent a collision.

The engineer had a right to assume, when he saw the intestate driving toward the track, that he would not drive upon it in front of the train. He owed the intestate no duty until he saw him about to drive upon the track and that he was in peril. As the case shows that the engineer then used all the means in his power to stop the train and avoid the collision, the court erred in submitting any question to the jury. The defendant's motion for a verdict should have been granted.

Judgment reversed and cause remanded.

IRENE M. MASSUCCO *v.* DOMINICO TOMASSI.

May Term, 1905.

Present: ROWELL, C. J., TYLER, MUNSON, START, WATSON, HASELTON, and POWERS, JJ.

Opinion filed November 9, 1905.

Breach of Promise to Marry—Evidence—Validity of Foreign Marriage—New Trial—Accident—Deprivation of Day in Court—V. S. 1662.

In an action for breach of promise to marry, the plaintiff may show, by defendant's declarations and by a witness who claims to have knowledge on the subject, the amount of defendant's property at the time of the alleged promise.

It is not error to allow a priest, whom the court found to have the requisite knowledge, to testify that in Italy a religious ceremony alone did not constitute a legal marriage.

It is not error to permit plaintiff to testify that, while she and defendant were consulting the priest, defendant asked the priest whether plaintiff could marry, and that the priest said she could, as she was 21 years old.

It was not error to permit plaintiff to testify that, except the religious ceremony, no marriage ceremony was ever performed.

It was not error to permit plaintiff to testify on re-examination, after having testified that she considered herself defendant's wife, that she did not claim to be his legal wife, having been married only in church.

The power of the Supreme Court to grant new trials, under V. S. 1662, is of broad scope, and without limitation as to the grounds upon which such new trials may be granted.

An accident is an unforeseen and unexpected event, occurring external to the party affected by it, and of which his own agency is not the proximate cause, whereby he unwillingly loses some legal right, or becomes subject to some legal liability, and another person acquires a corresponding legal right, which it would be unconscionable for the latter to retain.

In a petition for a new trial, on the ground that the petitioner was prevented by accident from making his defence, it appeared that the petitioner failed to appear in court upon the trial of his case because of his sickness in Italy and the death of his father there. *Held*, that the petitioner had been deprived of his day in court by accident, and that he was entitled to a new trial under V. S. 1662.

ASSUMPSIT for breach of promise to marry. Plea, the general issue, and notice. Trial by jury at the March Term, 1904, Washington County, *Stafford*, J., presiding. Verdict and judgment for the plaintiff. The defendant excepted.

The defendant excepted to allowing a certain witness to testify that when defendant came to her with the proposal of marriage, he said he was worth $30,000; to the plaintiff being allowed to testify that, while negotiations were going on between herself and defendant relative to the contemplated marriage, he told her that the reason why a civil marriage was necessary was "in regard to the property," and because marriage by the church alone was not so strong as marriage by

both church and civil authority; to the plaintiff being allowed to testify that, when she and defendant together were consulting with the priest about getting married, defendant asked the priest whether the plaintiff could get married, and that the priest answered that, being twenty-one years old, she could; to the plaintiff being allowed to testify that, except the religious ceremony already referred to, no marriage ceremony was ever performed between herself and defendant; to plaintiff being allowed to testify, on re-examination, after having testified that she considered herself defendant's wife, that she did not claim to be his legal wife, having been married only in church; to an Italian priest being allowed to testify that a marriage by religious ceremony alone did not constitute a legal marriage in Italy at the time in question,—the court having found the witness duly qualified.

At the close of the evidence defendant moved for a verdict upon the grounds that "the plaintiff says she was married, and that the priest gave her a certificate; that the parties considered themselves legally married; that she still says she is defendant's wife; that she lived with him as such in Vermont, and having done so under the form of a marriage, cannot bring this action; that if it came to her attention and knowledge that the marriage was not legal, and she continued to cohabit with him, she cannot maintain this action; that she only claims that the civil marriage would make it stronger, not that it would not be a valid marriage without it."

This motion was overruled, to which defendant excepted.

The defendant also excepted to that portion of the charge "as to the relation that existed between the plaintiff and the defendant as an element of damage"; claiming that "under the circumstances in which they went to living together it would not be an element." That portion of the charge was as follows: "In estimating the damages, you will consider the

rank and condition in which each of the parties stood; you will consider what advantage to her the marriage would have been, socially, and in a pecuniary way; you will consider what advantage it would have been to her to have him marry according to his promise, at the time he agreed to do so, and how much she has lost by his breach of that promise. And, in considering that question, you will have a right to consider—if you find it to be the fact—that she lived with him as his wife, gave herself to him as his wife, in reliance upon his promise to marry her—you have a right to consider that as an element of damage, with the other elements in the case. Damages are intended always as compensation, and it is for you, in your sound judgment, to say what sum of money will fairly compensate the plaintiff for defendant's breach of his promise, so that, so far as money will do it, she will be made whole for his not having done what he said he would do."

The defendant also brought his petition for a new trial, under V. S. 1662, to the Supreme Court for Washington County at its January Term, 1905. Said petition was heard on testimony taken and filed, at the May Term, 1905, together with defendant's exceptions. The opinion states the substance of said petition, and of the testimony taken in support thereof.

Lord & Carlton for the plaintiff.

The court properly charged the jury on the question of damages. Sutherland Damages, §§ 984-985; *Jennette* v. *Sullivan,* 63 Hun. 361; *Trammell* v. *Vaughn,* 158 Mo. 214; *Leighe* v. *Payne,* 102 Iowa 581; *Sheehan* v. *Barry,* 27 Mich. 217; *Civil* v. *Wallace,* 24 N. J. L. 291; *Whalen* v. *Laryman,* 18 Am. Dec. 157; *Sherman* v. *Ransom,* 102 Mass. 395; *Kelly* v. *Riley,* 102 Mass. 106.

J. P. Lamson, and *A. M. Sartorelli* for the defendant.

TYLER, J. Action for alleged breach of promise to marry. Upon an examination of the defendant's exceptions we find none of them sustainable as ground for a reversal of the judgment rendered by the court below. It was competent for the plaintiff to show by her own testimony what the defendant told her, and by the testimony of a witness who claimed to have knowledge upon the subject, what the amount of the defendant's property was at the time of the alleged promise.

An Italian priest was permitted to testify that a marriage by religious ceremony alone did not constitute a legal marriage in Italy. In this there was no error, as the record shows that the court first found that the witness was duly qualified to testify upon the subject. See *Reg.* v. *Parry*, 14 Eng. Law & Eq. 549; *Watson* v. *Walker*, 23 N. H. 472, cited by defendant.

Judgment affirmed.

PETITION FOR A NEW TRIAL.

TYLER, J. The suit was brought for an alleged breach of promise of marriage; it stood for trial at the March Term, 1903, Washington County Court, and the defendant came from Italy to make defence, but the plaintiff not being ready for trial when the case was reached, it was displaced, and the pressure of other business prevented its being tried at that term. At the following September term it was continued upon proof of the defendant's sickness in Italy, besides it was not reached in its order. At the March Term, 1904, several cases before it having been disposed of, it was second for trial. The defendant's counsel applied to the court to have the trial postponed until a later day in the term so that the defendant could arrive from Italy, but the court denied the application and held that the trial must proceed. The case was tried in the defendant's absence and the plaintiff obtained a large ver-

dict. The defendant arrived in court April 10, after verdict and judgment.

The plaintiff testified at the trial that a few months after the death of the defendant's wife, who was her sister, the defendant went to the village in Italy where she resided with her father, paid attentions to her for some time and then proposed a marriage with her; that she assented, and, upon the advice of a priest whom they consulted, a church ceremony was performed upon an agreement between themselves and their promise to the priest that they would be legally married upon their arrival in this country; that soon after their arrival in Montpelier, the plaintiff requested the defendant to have the marriage legally performed, but the defendant delayed the marriage on the pretence that he must receive a certain paper from Rome before they could be lawfully married, and that he put off the marriage for a year with this excuse, though she constantly urged its performance; that during this time she lived with the defendant as his wife, worked in his store, kept his house and cared for his children; that at the end of a year they returned to Italy and lived there in the same relations about ten months, she urging the marriage and he delaying it with various excuses; that she then left him and returned to St. Albans in this State with her sister and her sister's husband, who was the defendant's brother. She denied making any settlement with the defendant and denied receiving any money from him or from his brother. It appeared that soon after the plaintiff returned to this country the defendant married another woman. Testimony was given in behalf of the plaintiff at the trial tending to show that the defendant was worth $30,000 when he made the promise of marriage.

The material facts set out in the petition and the other affidavits attached are, that about six months after the death

of the petitioner's wife in January, 1899, the petitionee, who resided with her father in Italy, wrote a letter to the petitioner complaining of her father's ill treatment of her and offering to come to Montpelier, where the petitioner resided, and take care of his house and children; that he sent her money with which to pay her fare; that a few weeks later she wrote him that her father had taken the money and she was unable to make the journey; that in March following he went to Italy to visit his parents; that while there he met the petitionee several times and that it was finally decided that she should return with him to Montpelier; that upon the advice of a priest a religious ceremony was performed prior to their departure but did not constitute a legal marriage, as both parties understood, and that the priest said they could be married at any time in America; that they arrived in Montpelier early in May of that year; that the petitionee soon developed a violent temper and treated the petitioner and his children rudely and expressed a wish to leave his house; that she continued this abusive conduct towards him and his children for a year, when, not being able to endure it longer, he sold a profitable business and returned with her and the children to Italy, where they lived together until March, 1901, when the petitionee returned to this State with the petitioner's brother, who, with his wife, was coming here; that before she left he made a settlement with her by which his brother, who owed him one thousand dollars, was to pay her six hundred dollars in settlement, that the brother subsequently paid him four hundred dollars and held the six hundred for the petitionee by her request, he agreeing to pay her interest thereon; that the petitionee never requested the petitioner to marry her, but refused to marry him and refused to live with him, and that he never lived with her as his wife. The petitioner also deposes that he was not worth more than five thousand dollars at the time the petitionee left him and that she knew that fact.

The petitioner's attorney makes affidavit of the following facts in support of the petition: that he had informed his client by letter how his case stood and that he must be in Montpelier the last of February or first of March; that he replied from Italy that he was not then able to make the journey but believed he would be in March; that the attorney wrote him again urging him to be there on a certain day; that on March 6 he received a letter from him saying that he would be there early in April and to hold the case for trial and expressed a wish to have it tried as soon as it could be got ready after his arrival; that the attorney informed the court of the situation and that the defendant would be here to try the case in April; that the plaintiff's attorneys were willing that it be set at a later day, provided it would not result in a continuance, and that they so stated to the court; that the defendant's attorney showed the court the defendant's letter received by him March 6.

It appears that the parties are at variance in respect to the promise of marriage, their relations while they lived together, the settlement and the petitioner's financial means. The petitioner was entitled to a reasonable opportunity to make a defence in the court below. He did not have his day in court and a large verdict was rendered against him. The question is whether he is entitled to have the verdict set aside and a new trial granted him.

The petition is not based upon the ground of newly discovered evidence, but upon the claim that the petitioner was, by accident, prevented from making a defence to the action.

Questions of continuance and assigning cases for trial, must, as a rule, rest in the discretion of the trial courts, and we do not revise the action of the court below based upon the evidence that was before it. At the time the trial began the court doubtless had reason to believe that the defendant's

alleged sickness was a pretence for a delay. No evidence of his sickness was shown otherwise than by his letters to his counsel, but he now makes affidavit that he was prevented by sickness from making the journey until the last of March; that the death of his father, which occurred March 9, delayed him; that he should have come here the last of February, as requested by his counsel, had he not been prevented by sickness. If the court had known the facts which now appear in the petition and affidavit—that the defendant intended to make defence and would be in court for that purpose before the term closed, we may assume that it would have deferred the trial, certainly with the knowledge that the defendant's delay was caused by his sickness and the death of his father.

The jury lawfully assessed the damages in view of what they understood to be the defendant's pecuniary ability. It was for this purpose that the plaintiff introduced evidence in respect to the defendant's property. If it is true and the jury had known the fact, as the petitioner deposes, that he was not worth more than five thousand dollars, it is reasonable to suppose that the verdict would have been for a smaller sum.

The question is whether the case presented comes within V. S. 1662, which reads:

"The Supreme Court may grant a new trial in a cause determined by such Court, or by a county court, on petition of either party, subsequent to the term of the court at which the original judgment was rendered."

The Legislature has placed no limitation upon the power of the court to grant new trials under this section of the statute, nor prescribed the grounds for new trials. The Court has repeatedly construed the statute and fixed the boundaries of its power. It is evident that both the Legislature and the Court have intended to give a "broad scope" to this power, as was said in *Nelson* v. *Marshall*, 77 Vt. 44. In that case

it was held that a party was entitled to a new trial for the reason that by accident she had been prevented from filing her exceptions within the time required by law. The broad construction there given to this section, aided by the provision of section 1664, clearly entitle the petitioner to a new trial.

Webster defines accident as an event that takes place without one's foresight or expectation; an event which proceeds from an unknown cause, and therefore not expected; chance, casualty, contingency. The word has often received judicial construction. In *Bostwick* v. *Stiles,* 35 Conn. 198, it is said that it includes not only inevitable casualties, such as are caused by the act of God, but also those that arise from unforeseen occurrences, misfortunes, losses, and acts or omissions of other persons without the fault, neglect or misconduct of the party. *Alexander* v. *Bailey,* 2 Lea 639; *State* v. *Lewis,* 107 N. C. 978. See 1 Am. & Eng. Ency. 272 and notes. In the same line of reasoning are *Webster* v. *Smith,* 72 Vt. 12, and *Bradley Fertilizer Co.* v. *Fuller,* 58 Vt. 315. Rowell, J., in *Kopper* v. *Dyer,* 59 Vt. 478, aptly quotes from 2 Pom. Eq. § 823, n. 1: "Accident is an unforeseen and unexpected event, occurring external to the party affected by it, and of which his own agency is not the proximate cause, whereby, contrary to his own intention and wish he loses some legal right or becomes subjected to some legal liability, and another person acquires a corresponding legal right, which it would be a violation of good conscience for the latter person, under the circumstances, to retain." In that opinion the writer proceeds to say: "And the chief point of the thing is, that because of the unforeseen and unexpected character of the occurrence by which the legal relation of the parties has been unintentionally changed, the party injuriously affected thereby is in good conscience entitled to relief that will restore those relations to their original character, and place him in his former position."

We think that the petitioner's sickness and the death of his father may properly be considered accidental causes of his failure to appear in court upon the trial of his case, and that he is entitled to a new trial.

Judgment reversed, verdict set aside and a new trial granted.

STATE *v.* DOMINICO COSTA.

October Term, 1905.

Present: ROWELL, C. J., TYLER, WATSON, HASELTON, and POWERS, JJ.

Opinion filed November 20, 1905.

Criminal Law—Evidence—Return on Search Warrant—Witnesses—Refreshing Memory—Cross-Examination—Intoxicating Liquors—Criminal, Prosecution—Malt Extract—Medicinal Use—Use of Other Preparations—Use as a Beverage—Other Offences—Instructions—Reasonable Doubt—New Trial—Treating Jury—V. S. 1232.

In a prosecution for keeping intoxicating liquors with intent to sell the same without authority, the return on a search warrant, by virtue of which respondent's premises were searched, is not admissible against him.

In a prosecution for keeping intoxicating liquors with intent to sell the same without authority, an officer, in testifying, may refresh his memory by his return on a search warrant by virtue of which he searched respondent's premises.

The doctrine of the presumption of innocence is something distinct from the doctrine of reasonable doubt.

In a prosecution for keeping intoxicating liquors with intent to sell the same without authority, it was proper to allow the officer

who searched respondent's premises to testify that he made the search by virtue of a warrant to search for intoxicating liquor; the court having charged fully and correctly in respect of reasonable doubt and the presumption of innocence.

Where, in a prosecution for keeping intoxicating liquor with intent to sell the same without authority, a physician testified that the malt extract found in respondent's place of business was sold, used to a great extent, and prescribed by physicians, as a proprietary medicine, and the court charged that there was no doubt that said malt extract was a legitimate medicine frequently prescribed by physicians, and that such a preparation might be manufactured for a lawful purpose and lawfully sold as a medicine, the tendency of respondent's evidence as to the medicinal character of the medicine was sufficiently presented to the jury.

Where, in a prosecution for keeping intoxicating liquor with intent to sell the same without authority, the evidence tended to show that the malt extract found in respondent's place of business contained about four per cent. of alcohol and that respondent kept it for sale, and there was no claim or evidence to the contrary, it was not error to refuse to permit the manufacturer of said malt extract to testify as to the percentage of alcohol in the other medicines manufactured by his firm.

It was proper to exclude testimony of grocers and druggists that they had for a long time sold the malt extract in question openly and visibly.

It was proper to exclude evidence that the malt extract in question was used by the medical profession and by people generally for the same purposes as certain other proprietary medicines, and that a person could not become intoxicated by the use of such other medicines.

It was proper to permit the amount of alcohol and of the other ingredients in the malt extract found in respondent's place of business to be shown; for the character of a liquid containing more than one per cent. of alcohol may be such that its use as a beverage is impossible.

Where, in a prosecution for keeping intoxicating liquor with intent to sell the same without authority, the State relies upon extracts, tinctures, essences, or compounds having a legitimate use for medicines, culinary, or toilet purposes, the question is not simply whether these articles contain more than one per cent. of alcohol, but there is the further question whether they were sold to be used as a beverage.

In respect of the sale of such articles, the intent governs. If there is no intent to sell these preparations to be used as a beverage, there is no offence.

In a prosecution for keeping intoxicating liquor with intent to sell the same without authority, testimony of a witness that he bought four bottles of the malt extract found in respondent's place of business, and that respondent told the witness that he could not drink it in the store but must go outside to do so, is admissible as tending to show respondent's intent.

Evidence tending to show that the respondent sold a malt extract for use as a beverage in March, 1905, tends to show that in June of that year he was keeping to sell as a beverage certain bottles of said extract which he was then exposing for sale.

It was proper to allow a witness to testify that, when he purchased a bottle of the malt extract found in respondent's place of business, he asked respondent to open the bottle for him, but that respondent refused to do so, saying that witness must take it away.

Where, in a prosecution for keeping intoxicating liquor for sale without authority, the State relied upon evidence tending to show that respondent sold the malt extract found in his place of business to specified persons for use as a beverage, it was not error to refuse to allow respondent to show that he sold this extract to still another person for medicinal use in his family.

An instruction that, if the malt extract kept by respondent was bought and used as a beverage because of the intoxicating ingredient contained therein, it was a beverage and an intoxicating one within the statute, was not erroneous, when accompanied by a correct instruction as to the amount of alcohol which the preparation must have contained to be deemed intoxicating liquor, and by the further instruction that, since it had a legitimate medicinal use, its use as a beverage would not make respondent liable, unless he kept it to sell as a beverage.

In a prosecution for keeping intoxicating liquor with intent to sell the same without authority, the State relied upon certain malt extract kept and sold by respondent, and which had a legitimate medicinal use, the court charged: "We do not submit the question—we do not make your verdict depend in any way upon the question—whether it is possible for the ordinary man, or any man, to drink enough of this preparation to intoxicate him." This instruction was accompanied by a correct instruction as to the amount of alcohol which the preparation must have contained to be deemed an intoxicating liquor, and by the instruction that, in

determining whether the preparation was sold for use as a beverage, all the evidence in the case bearing upon the composition of the liquid, the medicinal properties of the ingredients, the percentage of alcohol, its effect or lack of effect in the quantities testified to, and its pleasantness or unpleasantness to the taste, should be considered. *Held*, that the instruction quoted was not erroneous.

In charging the jury in a criminal case, it is not error for the court to refuse to define the phrase "reasonable doubt."

V. S. 1232, which provides that if a party in whose favor a verdict is rendered during the same term of court gives to a juror in the case any victuals or drink by way of treat, it shall be ground for a new trial, has no application to a criminal case.

Although V. S. 1232 has no application in criminal cases, a respondent should be granted a new trial where there is sufficient reason to believe that a verdict has been returned against him in consequence of corruption practiced upon the jurymen by an officer or by anyone else.

No officer of the State can make himself an agent of the State in respect of practices forbidden by the State.

Where, in a criminal prosecution, after the case had been submitted to the jury and they had retired to consider it, they told the sheriff that they should want supper, which the sheriff thereupon ordered, but before going to supper the jury returned their verdict, and were then permitted to eat the supper procured at the expense of the State, there was nothing in the nature of corruption or impropriety.

INFORMATION for keeping intoxicating liquor with intent to sell the same without authority. Plea, not guilty. Trial by jury at the June Term, 1905, Caledonia County, *Munson*, J., presiding. Verdict, guilty; judgment and sentence thereon. The respondent excepted.

Respondent's defence was that he did not keep the malt extract for sale as a beverage, but kept it for sale, and sold it, only as a medicine.

Harland B. Howe for the respondent.

Our liquor law does not apply to the sale of medicinal preparations. *Russell* v. *Sloane*, 33 Vt. 656; *Fober* v. *Green*, 72 Vt. 117; *State* v. *Kezer*, 74 Vt. 50; *Carl* v. *State*, 87 Ala. 17.

Frank D. Thompson, State's Attorney, and *David E. Porter* for the State.

The fact that witnesses in March had bought malt extract from respondent for use as a beverage, is evidence tending to show that respondent kept the extract in question in the following June for sale as a beverage. *State* v. *White*, 70 Vt. 225; *State* v. *Haley*, 52 Vt. 476; *Com.* v. *Cotton*, 138 Mass. 500.

Evidence that respondent sold the malt extract to one man for use as a medicine does not tend to show that he did not also keep it for sale as a beverage. *Com.* v. *Roland*, 97 Mass. 597; *Aikin* v. *Kennison*, 58 Vt. 665; *Harris* v. *Howard*, 56 Vt. 695; *Com.* v. *Jeffries*, 7 Allen 548, 83 Am. Dec. 712.

Under our statute the sale of any beverage which contains more than one per cent. of alcohol is prohibited, irrespective of whether it is intoxicating. *Com.* v. *Snow*, 133 Mass. 575; *Com.* v. *Curran*, 119 Mass. 206; *Com.* v. *Timothy*, 8 Gray 480; *State* v. *McKenna*, 16 R. I. 398.

HASELTON, J. This was an information for keeping intoxicating liquor with intent to sell the same without authority. The evidence on the part of the State tended to show that the respondent kept a fruit and cigar store "and sold soda and soft drinks," and that June 24, 1905, one A. H. Noyes searched said store and found in the cellar a large quantity of "Red Cross Canada Malt Extract" put up in pint bottles, and that he found three bottles of the same on a shelf in the store, and one bottle in the show window. The time of this search is the time of the alleged offence. Noyes testified, under

objection and exception, that he made the search referred to and found the malt extract while acting under a warrant to search the respondent's store for intoxicating liquor. The objection was that the search warrant and the return thereon were the best evidence. As to the return it is enough to say that in this proceeding it was not admissible against the respondent. Noyes might have used it to refresh his recollection and the respondent might have cross-examined from it, and if it was inconsistent with the testimony of Noyes the respondent might have made another use of it, but the man who made the search was properly called to testify to the finding of the malt extract and the circumstances in which it was found. One of these circumstances, the finding of a bottle of the extract in the show window, was favorable to the respondent.

But it is urged that the witness should not have been allowed to testify that he made the search by virtue of a warrant to search for intoxicating liquor; that the warrant should have been produced. However, the character and sufficiency of the warrant were not in issue. The witness was merely explaining how he came to be hunting over the respondent's cellar and other premises. It is often impracticable for a witness to testify as to his doings without referring in a general way and by its proper designation to some writ, warrant, execution, chattel mortgage, book or other document; and there is no rule of law which, properly interpreted, makes it error for a witness to do so without producing the document when the contents of the document are not the subject of inquiry and are not material to any question raised. The respondent concedes that the witness might well enough have said that he was at the respondent's store by virtue of a warrant, but urges that the witness prejudiced the respondent by saying that he was acting under a warrant to search for in-

toxicating liquor. But if the witness had simply testified that he had a warrant, the respondent might have argued that the jury were left to infer that there was a warrant out for the arrest of the respondent or for the search of his store for some purpose not connected with the very charge for which he was on trial. If the witness had left his testimony in the way in which it is said by respondent's counsel that he should have left it, the respondent might have argued that he was prejudiced in respect to his general character.

It is undoubtedly true that there is danger of prejudice against a respondent because he stands in court under arrest charged with a criminal offence, since it is well understood that under our system he could not be in that situation unless there was some evidence or supposed evidence against him. It is for this reason, more than any other, that the doctrine of the presumption of innocence is maintained in this jurisdiction as something distinct from the doctrine of reasonable doubt. And so in this case the court not only charged fully and correctly with regard to reasonable doubt and the presumption of innocence, but also particularly charged the jury that the facts that the charge for which the respondent was on trial had been brought against him and that he was on trial therefor were not to be taken against him.

The evidence tended to show that the extract, to the finding of which the testimony of Noyes related, contained about four per cent. of alcohol and that the respondent kept it for sale, and there was no claim or evidence to the contrary. But the main question in the case was whether the respondent kept this malt extract to sell for medicinal uses only, or whether he kept it to sell for use as a beverage. Several exceptions relate to the claim that the respondent was unduly restricted in proving that the malt extract was a legitimate proprietary medicine which might properly be sold for medicinal uses; and

that the tendency of the evidence in that regard was not satisfactorily presented to the jury; but the case shows otherwise. The respondent himself testified that he was a wholesale and retail dealer in patent medicines, that this extract was such a medicine, that he did not keep it for sale as a beverage. Dr. E. W. Hitchcock of St. Johnsbury gave evidence tending to show that the malt extract "was sold and used as a proprietary medicine to a great extent, that it was generally prescribed by physicians, that it was used to a large extent as a medicinal tonic." The facts which this evidence of Dr. Hitchcock tended to show were treated as established, for the court charged the jury, in substance, that there was no question in the case but that the malt extract is a legitimate medicine frequently prescribed by physicians and extensively sold in the drug trade.

The court charged further that "a preparation of this kind may be manufactured for a lawful purpose and be kept and sold as a medicine without violation of law." Indeed, there is considerable more in the charge to the same effect.

The respondent called as a witness one Harris, a member of the firm which manufactures the Red Cross Canada Malt Extract, and he testified to the effect that his firm manufactures various other proprietary medicines, among them Harrisonia, sarsaparilla, and a preparation of beef, iron and wine. In the course of the testimony of this witness the respondent offered to show "the percentage of alcohol in the other proprietary medicines which his firm manufactured and sold for the same purpose as said extract, and particularly that beef, iron and wine contained 50 per cent. of alcohol, for the purpose of comparing this extract, which was one of said proprietary medicines, with said other proprietary medicines, and as tending to classify and characterize it as a patent or proprietary medicine." The offered evidence was excluded. By

the same witness the respondent offered to show that two grocers and three druggists in St. Johnsbury had for a long time sold this malt extract openly and visibly "as tending to characterize the article as a patent or proprietary medicine and to show its general use as such." Evidence under this offer was excluded. The respondent also offered to show by the same witness that this malt extract "was compounded and put upon the market to be used and administered for the same purposes and for the same general use as said other proprietary medicines which his firm manufactured." The offered evidence was excluded.

These rulings of the court excluding offered evidence from the witness Harris were not erroneous. Evidence as to beef, iron and wine, Harrisonia, and the other proprietary medicines manufactured and sold by the firm which manufactured the malt extract, and of the doings of a few dealers in St. Johnsbury would have been wholly immaterial, though it might have been misleading.

After Dr. Hitchcock had given the evidence above referred to tending to establish the character of the malt extract as a legitimate medicine, prescribed as such by physicians, and lawfully sold and used for medicinal purposes, the respondent offered to show by the doctor: (1) "that this malt extract was used by the medical profession and by people generally for the same purposes as sarsaparilla, Paine's Celery Compound, Peruna, and beef, iron and wine; (2) that Peruna contained from 50 to 61 per cent. of alcohol, beef, iron and wine from 25 to 30 per cent. of alcohol; (3) that a person could not become intoxicated upon Peruna, beef, iron and wine, or this extract." Each of these three offers was made and excluded separately, but all were made "as tending to compare this extract with other patent or proprietary medicines as to its composition, general use, effect upon the system, and to classify and show

its use as a patent or proprietary medicine." But these comparisons would have been irrelevant and would have had a tendency to get before the jury evidence with regard to various preparations, more or less popular as remedies, in a way that would have had a tendency to lead the jury to decide the case upon erroneous grounds.

The court, however, permitted the actual amount of alcohol and of the other ingredients of the extract to be shown, and properly did so, for the character of a liquid containing more than one per cent. of alcohol may be such that its use as a beverage is impossible, as is the case with some virulent poisons. The mere fact that a liquid can be and is swallowed does not make it a beverage. *Tabor* v. *Green*, 72 Vt. 117, 47 Atl. 391.

So it must be said in the case of extracts, tinctures, essences and compounds having a legitimate use for medicinal, culinary or toilet purposes, that the mere presence as a solvent, preservative, or otherwise, of more than the proportion of alcohol named in the statute does not make the preparation one to which the statute applies.

In respect to such articles the inquiry is not simply whether they contain more than one per cent. of alcohol, but there is the further inquiry whether or not the articles are sold to be used as a beverage. In respect to the sale of such preparations the intent governs. If there is no intent to sell these preparations for other than legitimate uses there is no offence. If, however, a preparation is capable of being used as a beverage, and is sold or kept for sale with the purpose, intent or understanding that it is to be used as a beverage, then, if it contains more than one per cent. of alcohol, an offence is committed.

In this trial the State proceeded in accordance with the views just stated and introduced evidence tending to show that

the malt extract in question was kept for the purpose and with the intent of selling it, or some part of it, for use as a beverage. The State introduced evidence tending to show that in June, 1904, one Petty bought this malt extract of the respondent, that in March, 1905, one Woodward bought four bottles, one Bennett two bottles, and one Besant two bottles; and that on these occasions of purchase and sale the respondent told the purchasers that they could not drink the extract on the premises. Woodward testified that he bought his four bottles for drinking purposes but that he did not inform the respondent of that fact. But the evidence tended to show that the respondent told Woodward that he could not drink it in the store, that he must go outside to drink it. To the reception of this evidence the respondent objected and excepted, but the evidence was clearly admissible. The intent of the respondent in making the sales to Woodward which the evidence tended to show, was indicated by the evidence tending to show what the respondent told Woodward about going outside to drink his purchase. It tended strongly to show that the respondent understood that Woodward was buying the extract for bibulous rather than for medicinal purposes, and it is immaterial whether he got that understanding from what Woodward said or in some other way. The evidence tended to show that in some way the respondent was aware of the use to which the customer intended to put the malt extract, and that the respondent was also aware that it could be put to such use. The evidence tending to show that the respondent sold this malt extract to Woodward for use as a beverage in March, 1905, tended to show that he was keeping the extract in question for sale as a beverage, June 24, 1905. *State* v. *White,* 70 Vt. 225, 39 Atl. 1085; *Com.* v. *Cotton,* 138 Mass. 500.

Petty's testimony tended to show that he bought the extract of the respondent in June, 1904, and that on one occa-

sion he asked the respondent to open a bottle for him, but that the respondent said "no," and told him he would have to take it away. The testimony of Petty was taken under objection and exception; but it was properly received. It bore, though more remotely than Woodward's, upon the question of the respondent's intent in keeping the malt extract which he had on hand, as the evidence tended to show, June 24, 1905. The statute in force at the time to which the testimony of Petty related was, indeed, different from that under which the respondent was prosecuted. But the statute of 1902 and that of 1904 were the same in all respects that could affect the intent with which the respondent was keeping and dealing in this extract.

The respondent offered to show that he sold this extract to one Randall for medicinal use in his family. The offer was made on the ground that the offered testimony would tend to characterize the keeping of the extract by the respondent, to show his intent and good faith, and to rebut the evidence tending to show that he had sold the extract to Woodward, Bennett, Petty, and Besant for use as a beverage. But proof that he sold the extract to Randall for a legitimate use was not admissible on any of the grounds stated nor on any conceivable ground. The fact that the respondent embraced an opportunity to make a legitimate sale of the article would have no bearing upon the issue. The State was not called upon to show that the respondent would refuse to make any but illegal sales, and it would not have aided the respondent if he had shown that he had no scruples against taking the profit of a legal sale.

The respondent took 27 exceptions to the charge of the court. Counsel for the respondent says nothing in his brief about 21 of these, many of which were to very obvious principles of law. We have, however, examined them all and the

parts of the charge to which they relate, for the whole law of the case could not be stated in one sentence, and propositions which seem doubtful standing alone are seen to be sound when taken in their connection. We find no error in the charge.

The sentence of the charge about which the respondent chiefly complains is this: "If this preparation was bought and used as a beverage because of the intoxicating ingredient contained in it, it was a beverage and an intoxicating beverage within the meaning of the law." But this statement was accompanied by a correct instruction as to the amount of alcohol that the extract must contain in order that in any view of the case it could be deemed intoxicating liquor, and by further instructions to the effect that since it had a legitimate use as a medicine, its use as a beverage would not make the respondent liable unless he kept it to sell for use as a beverage.

Another sentence of the charge which the respondent complains of was this: "We do not submit the question, we do not make your verdict depend in any way upon the question whether it is possible for the ordinary man or any man to drink enough of this preparation to make him actually intoxicated." But this sentence immediately follows a statement to the effect that the statute has fixed the amount of alcohol that it is essential for a preparation to contain in order that it may be deemed an intoxicating liquor within the meaning of the law, and the sentence of the charge complained of was entirely correct in its application to the element of the case which the court was then presenting.

But this was not all of the case, and so with careful regard to the rights of this respondent and of others dealing in preparations containing alcohol, the court charged the jury that, in determining whether or not this preparation, such as it was, was kept to be sold for use as a beverage, "all the evidence in the case bearing upon the composition of the liquid

and the medicinal properties of the various ingredients, the percentage of alcohol contained in it, its effect or lack of effect in the quantities testified to, whether it is pleasant or unpleasant to the taste, and what is shown regarding its use as a medicine" was for the consideration of the jury. *Russell* v. *Sloane*, 33 Vt. 656; *Fober* v. *Green*, 72 Vt. 117, 47 Atl. 391, and *State* v. *Kezer*, 74 Vt. 50, 52 Atl. 116, all cited by the respondent, were obviously and rightly treated as sound law and as still applicable to the extent to which the Kezer case is held to be applicable in *State* v. *Krinski*, 78 Vt. 162, 62 Atl. 37; that is, the principles laid down in those cases were given such effect as could be given them under a statute which treats a beverage as intoxicating liquor if it contains more than one per cent. of alcohol.

The respondent excepted lastly "because the court did not tell the jury that the respondent would have a right to sell medicine, if he sold it as a medicine and not as a beverage, even though it contained more than one per cent. of alcohol. That the jury should be charged as last aforesaid because twelve laymen would not be liable to understand the charge as given upon that matter." This exception concedes the correctness of the charge in that regard, and there was nothing in the subject-matter or the presentation of it that could possibly have been misunderstood by the jurymen.

The respondent made 14 requests to charge. Some of them were complied with in terms and some in substance, and others were not complied with. Two requests were for a definition of the phrase "reasonable doubt." Neither of the definitions asked for would have aided the jury and the court properly omitted to give these definitions. *State* v. *Blay*, 77 Vt. 56, 58 Atl. 794. The court refused to comply with no request which the respondent was entitled to have followed.

The respondent made a motion to have the verdict set aside and a new trial granted. Under this motion the court found that at about a quarter past five in the afternoon of the day on which the jury took the case and during their deliberations they told the sheriff having them in charge that they should want supper and that the officer immediately ordered their supper. However, at about a quarter before six and before going to supper they returned their verdict into court. The sheriff then told them that as he had ordered their supper they could eat it, and accordingly they partook of the supper which had been provided for them. The expense was borne by the State. It was on the ground that this supper was given the jurors by the State as a treat that the respondent moved to have the verdict against him set aside and a new trial granted. The court overruled the motion as a matter of law and the respondent excepted. The respondent now argues that the motion should have prevailed, and relies upon V. S. 1232, which provides that "if a party in whose favor a verdict is rendered, during the same term of court gives to a juror in the cause, knowing him to be such, any victuals or drink or procures it to be done by way of treat, either before or after such verdict, the same on proof thereof shall be set aside and a new trial granted."

But this statute cannot apply, and was not intended to apply to criminal cases. See *Baker* v. *Jacobs,* 64 Vt. 197, 23 Atl. 588. It cannot apply in a case in which the respondent is acquitted, and it cannot apply in a case in which the respondent is convicted, for no officer of the State can make himself an agent of the State in respect to practices forbidden by the State; nor would the fact that the expense attending an illegal act was in some way put upon the State make the government itself a party to the illegal transaction. What is intimated in *Carlisle* v. *Sheldon,* 38 Vt. 440, in respect to treating by an

authorized agent of a town in a civil suit, has no application here. But while the statute relied upon by the respondent has no application in criminal cases, a respondent should be awarded a new trial when there is sufficient reason to believe that a verdict has been returned against him in consequence of corruption practiced upon the jurymen by an officer of the State or by any one else. But here the facts found have no tendency to show corruption, or an attempt at corruption. No. 135, Acts of 1898, provides that, "when in the trial of a criminal cause in county court a petit jury is kept together by the order of the court, the necessary expenses of the board and lodging of such jury while so kept together shall be borne by the State." This supper was ordered and provided for the jurors, and so the expense of it was incurred, while the jurors were kept together, and there was nothing in the nature of corruption or impropriety in the conduct of the sheriff in letting the jurymen eat the supper which he had provided in pursuance of his duty under the statute.

The motion to have the verdict set aside and a new trial granted was properly overruled as a matter of law.

Judgment that there is no error in the proceedings, and that the respondent take nothing by his exceptions. Let execution be done.

ROSWELL BELKNAP *v.* ALBERT BILLINGS.

May Term, 1905.

Present: ROWELL, C. J., TYLER, MUNSON, START, HASELTON, and POWERS, JJ.

Opinion filed November 21, 1905.

Assault and Battery—Accord and Satisfaction—Promissory Note—Prima Facie Settlement—Instructions.

In trespass for assault and battery, where the issue is whether a certain note given by defendant to plaintiff was accepted by the latter in satisfaction of the cause of action, or was so accepted only on condition that it should be paid when due, it is not error to refuse defendant's request to charge that "a promissory note given and received in payment for a personal injury resulting from a tort is *prima facie* payment therefor, and a suit cannot be maintained for that tort whether the note is paid or not."

TRESPASS for assault and battery. Pleas, the general issue, *molliter manus imposuit* in defence of the possession of defendant's dwelling, self-defence, and accord and satisfaction. Trial by jury at the December Term, 1904, Windsor County, *Watson*, J., presiding. Verdict and judgment for the plaintiff. The defendant excepted.

Davis & Davis for the defendant.

The court should have complied with defendant's request to charge. *Thacher* v. *Densmore*, 5 Mass. 302; *Fowler* v. *Bush*, 21 Pick. 231; *Hutchins* v. *Olcutt*, 4 Vt. 549; *Torry* v. *Baxter*, 13 Vt. 452; *Follett* v. *Steele*, 16 Vt. 35; *Farr* v. *Stevens*, 26 Vt. 299; *Collamer* v. *Langdon*, 29 Vt. 32; *Wait* v. *Brewster*, 31 Vt. 516; *Parker* v. *Adams*, 59 Vt. 154; *Goodnow* v. *Tyler*, 7 Mass. 43; *Maneely* v. *McGee*, 6 Mass. 143; *John-*

son v. *Johnson,* 11 Mass. 362; *Chapman* v. *Durant,* 10 Mass. 47; *Butts* v. *Dean, Admr.,* 1 Met. 76.

Joseph C. Enright, and *Edward R. Buck* for the plaintiff.

HASELTON, J. This was an action of trespass for assault and battery. The defendant filed four pleas, one of which was that the defendant gave and the plaintiff accepted a certain promissory note in full satisfaction and discharge of the alleged cause of action. To this plea the plaintiff replied that the note therein mentioned was not accepted by the plaintiff in payment and satisfaction of the cause of action in the declaration alleged, but that the note was accepted as satisfaction only on condition that it be paid when due, and that the note was long overdue and remained unpaid.

At the June Term, 1902, of the Windsor County Court this replication was held sufficient on demurrer, and later this Court so held. See *Belknap* v. *Billings,* 76 Vt. 54, 56 Atl. 174, where the pleadings, which are referred to in the bill of exceptions herein, are stated with sufficient fullness.

At the December Term, 1904, of the Windsor County Court, the case was tried by a jury on its merits, and came here on a single exception. That exception is to the refusal of the court to comply with a request to charge: "That a promissory note given and received in payment for personal injury resulting from a tort is *prima facie* payment therefor, and a suit cannot be maintained for that tort whether the note be paid or not." But if a note is, in fact, given and received in payment, it is payment. To say expressly or impliedly that it is merely *prima facie* payment when given and received in payment would be confusing and incorrect, and the court rightly declined to comply with the request.

The briefs of counsel have largely to do with propositions other than that embodied in the request which the court did not in terms comply with.

In this case the parties were at issue as to whether the accepting of a certain note was to operate as payment or not. The defendant claimed and his evidence tended to show that it was so agreed; but the plaintiff claimed and his evidence tended to show that the note was to operate as payment only in case it should be paid when due.

The full charge is referred to, and upon examining it we find that the jury were correctly and fully instructed upon the subject-matter which the request was probably intended to cover.

Judgment affirmed.

M. A. LEWIS *v.* JOHN CRANE & SONS.

May Term, 1903.

Present: TYLER, START, WATSON, and HASELTON, JJ.

Opinion filed November 21, 1905.

Negligence—Master and Servant—Partnership—Injuries to Servant—Evidence—Expert Testimony—Damages—Opening Statement—Witnesses—Re-Examination—Pleading—Duplicity—Presumptions Against Error—Motion for New Trial.

In an action on the case for negligence brought against defendants "as individuals or as partners," defendants are not entitled to have plaintiff ordered to elect whether he will proceed against defendants as individuals or as partners.

The fact that plaintiff's counsel, in outlining his claim as to the law of negligence in his opening statement, deviated somewhat from an accurate definition of negligence was no ground of exception, where he expressly disclaimed a correct legal form for his statement, and reminded the jury that they were to take the law from the court, and said nothing of an inflammatory character, and suggested that the claim of defendants would differ from that of plaintiff.

Duplicity in a declaration is cause for special demurrer only, and cannot be reached by a motion to compel an election.

In an action on the case for injuries to their servant, caused by the alleged negligence of defendants in using an unsafe hook to sustain one end of a swing-staging, evidence of the kind of staging used was admissible.

Evidence that, at the time defendants purchased some ladders at a stated price, the hook in question was given to them by the seller without extra charge, was admissible.

Evidence by a blacksmith, who did some work upon the hook in question before defendants obtained it, as to the character of the hook and to the effect which his work would tend to have in weakening it, and that he told one of the defendants about the hook, was admissible.

Evidence of a witness, who was present when the officer served the writ in the case, that the wife of one of defendants then showed witness parts of the broken hook, and describing the parts so shown, was admissible.

Evidence of a competent blacksmith, who repaired the hook in question a short time before the accident, as to the ways in which the hook could have been repaired, and that the hook had the characteristics of poor iron, was admissible.

To reserve an available exception to the exclusion of evidence an offer must be made.

Evidence of an experienced painter, who had made great use of swing-stagings, as to the weight which a hook of the size in question would support, and that he would "guarantee" that a staging supported by such a hook would support a certain weight, was admissible.

Held, that the witness was not testifying to the safety of swing-stagings in general, but merely to the normal strength of an iron hook of the diameter of the one in question; and that the jury must have understood the witness to have used the word "guarantee" as a strong expression of opinion.

It appearing that the general safety of swing-stagings was not an issue in the case, the evidence of a carpenter of long experience as to whether swing-stagings were suitable for such work as that in question was properly excluded.

Evidence as to what defendant would have done with the hook in question, if he had been told that it was poor iron and not safe, is mere conjecture and was properly excluded.

Evidence that defendant was in charge of the inside arrangement of the building on which work was being done, the injury having occurred while plaintiff was at work on the clapboarding, was inadmissible to show that defendant was in charge of the clapboarding, and should have been excluded.

A party cannot object to the re-examination of a witness on matters which he himself has brought out on cross-examination.

A declaration alleging injuries to plaintiff's legs, back, and body, but not describing with any precision the parts claimed to be injured, is broad enough to authorize the admission of evidence as to the condition of plaintiff's ankle.

Where the objection to evidence of the condition of an injured ankle at the time of trial is that it is not admissible under the declaration, this Court will presume, the bill of exceptions disclosing nothing to the contrary, that the evidence was connected with testimony as to the injuries sustained.

In an action on the case for negligence causing injuries resulting in a stiff ankle, a physician may testify as an expert as to the nature of the stiffness, the motions and actions that it will impede, its causes, and its character as to being temporary or permanent.

In an action on the case for negligence brought against defendants "as individuals or as partners," plaintiff may inquire into the business relations of defendants between themselves, although plaintiff declines to elect whether he will proceed against them as individuals or as partners.

In an action for personal injuries, evidence as to plaintiff's wages at times shortly before the injury complained of is admissible on the question of damages.

A verdict should not be directed for defendants, if one count in the declaration is good and there is evidence to support it.

The fact that a small model of the barn upon which plaintiff was working at the time of the injury, and a painter's staging hook, neither of which had been received in evidence, were discovered in the jury room after the jury had retired to consider their verdict, was not ground for setting aside the verdict or discharging

the jury, it appearing that immediately upon the discovery of the fact the court called the jury into the court room and admonished them, and that the jury had agreed upon a verdict for plaintiff before the model and hook got into their possession.

CASE for negligence. Plea, not guilty. Trial by jury at the June Term, 1901, Caledonia County, *Munson,* J., presiding. Verdict and judgment for the plaintiff. The defendants excepted.

J. P. Lamson, and *May & Simonds* for the defendants.

Herbert I. Goss, and *Dunnett & Slack* for the plaintiff.

HASELTON, J. This was an action on the case in which the plaintiff sought to recover for injuries alleged to have been sustained through the negligence of the defendants. The cause was tried by jury at the June Term, 1901, of the Caledonia County Court. A verdict was returned for the plaintiff and judgment was rendered thereon. The defendants excepted.

The defendants were set up in the writ as John Crane, Charles Crane and George Crane "as individuals or as partners under the firm name and style of John Crane & Sons." Before the introduction of any evidence the defendants moved that the plaintiff be required to elect whether he would proceed against the defendants as individuals or as partners. But the doctrine invoked was not applicable. The action being what it was the defendants were not entitled to have the plaintiff ordered to elect in what way he would attempt to connect the defendants. The motion was properly overruled.

In an opening statement to the jury the plaintiff's counsel briefly outlined his claim with regard to the law of negligence. The gist of the statement in this regard was that negligence is a shortage of duty, but some expressions were

used which deviated from an accurate definition of negligence. Counsel expressly disclaimed that such statement was made in correct legal form, and at the outset reminded the jury that they were to take the law from the court. There was nothing of an inflammatory character in the statement, and what was said about the law was put forward in a way that suggested to the jury that the claim of the defendants would differ from that of the plaintiff. An exception was taken to the opening statement, but it avails nothing. In so holding there is no intention on the part of the court of giving countenance to the idea that counsel may argue the law to the jury, or read law to the jury, or treat as open questions of law upon which the court has ruled, or in any way seek to have the jury understand that they can do otherwise than to take the law from the court.

At the close of the plaintiff's opening statement the defendants claimed that the plaintiff had alleged more than one cause of action in the same count and moved that the plaintiff be compelled to elect which of such causes of action he would rely upon. The motion was overruled and the defendants excepted. This motion was properly overruled. If the count in question was bad for duplicity and the defendants desired any ruling or action of the court on that account, they should have demurred. *Onion* v. *Clark*, 18 Vt. 363.

The following quotation from the exceptions shows, in brief, what the case on trial was: "The accident occurred November 3, 1899, while plaintiff was working for the defendants on a barn they were building on their premises in Cabot. The negligence complained of was the furnishing by defendants of an unsafe iron hook which sustained one end of a swing-staging." Evidence as to the kind of staging used was received under objection and exception by the defendants, but very clearly nobody could testify intelligibly about the

character of the hook in question unless evidence was received with regard to the kind of staging of which it formed a part and with regard to its function as a part of such staging.

Evidence on the part of the plaintiff tended to show that in the August next before the accident the defendants purchased some ladders at the price put upon them, which was $7.50, and that at the time of the purchase they were shown the staging hook in question and another, and allowed, if they desired, to take the hooks with the ladders without paying anything in addition to the price put upon the ladders; that the defendants paid the price put upon the ladders and took the hooks with them, and that the hooks were put into a stable and were not used until a few days before the accident. The testimony as to the amount paid for the ladders and as to the throwing in of the hooks was received subject to objection and exception on the part of the defendants. But the fact, if it was a fact, that in the sale and purchase of the ladders the hooks were treated as the testimony tended to show they were was a circumstance proper for the jury to consider along with the other circumstances which they might find in their efforts to determine what the defendants knew or ought to have found out about the hook in question. The price paid for the ladders, or any other fact about the ladders, taken by itself, was wholly immaterial, as there was no claim or evidence that the ladders had anything to do with the accident. The price paid for the ladders could not have been received and treated otherwise than as an incident of the transaction through which the defendants got the hook in question, and we discover no error in the reception of the testimony on the part of the plaintiff relative to the acquirement by the defendants of the hooks and ladders.

It appeared that the hook in question was procured by the defendants from one Parlin, and there was evidence tend-

ing to show that one Wales, a blacksmith, did some work upon the hook during the summer before the occurrence of the claimed injury to the plaintiff, and while Parlin had the use of the hook. Wales was a witness in behalf of the plaintiff and was permitted to testify to the character of the hook upon which he did the work and to the effect which his work upon the hook would tend to have in weakening it, and that he told one of the defendants about this poor hook. A part of this evidence was received under objection and exception but all of it was admissible, since, as had been said, there was evidence tending to show that the hook upon which the blacksmith Wales did his work was the hook complained of.

Evidence in the case tended to show that the defendants had no hooks except the two already referred to. In connection with this evidence one Ada Stone, who it appeared was at the defendants' house when an officer went there to serve the writ in the case, was permitted to testify that at that time Mrs. Crane showed the parts of the broken hook, and said witness Ada described the pieces so exhibited, the shape and size of the hook, the angle and location of the break and the indications of welding. This was not evidence on the part of Mrs. Crane but was the evidence of a competent witness tending to show the appearance of the parts of the hook in question when she chanced to see them. This testimony of Ada Stone was received subject to objection and exception by the defendants, but there can be no doubt of its admissibility. In their brief, the defendants' counsel make no serious contention here, but say: "Perhaps the evidence of Ada Stone was admissible." The exceptions state that "at the trial the defendants were requested to produce the parts of the hook which broke, but did not know their whereabouts." This statement makes it doubly sure that there was no error in the reception of the evidence of Miss Stone.

Charles Preston, a carpenter, was one of the plaintiff's witnesses. It is stated in the exceptions that on cross-examination by the defendants he testified as to "the general danger arising from swing-stagings." Thereafter upon re-examination he testified, in effect, that he thought the danger that such a staging would swing away from the building might be avoided. This testimony upon re-examination came in under objection and exception on the part of the defendants. But we assume from the language of the exceptions that the defendants had on cross-examination made Preston their witness in respect to the danger arising from the use of swing-stagings, and that so they have no ground to complain because during the re-examination of the witness in behalf of the plaintiff he was examined upon that point.

It appeared that the second day before the breaking of the hook it was repaired by one Myers, the repairs consisting in cutting and mending. The plaintiff called Myers as a witness and the witness told how he mended the hook. Under the defendants' objection and exception he was then asked whether it could have been repaired in any other way by a blacksmith. His reply was "it could have been patched." Under objection and exception he testified to the characteristics of iron which is not good when it is heated and scarfed. His evidence tended to show that the hook in question had the characteristics of poor iron and that while the hook was at his shop and after he had mended it he informed the defendant, John, that the hook was made of poor iron and was unsafe. The exceptions state that the witness Myers was a competent blacksmith. So far as the exceptions show all the testimony of Myers was properly received. It was the testimony of a competent blacksmith tending to show that before the accident he had mended the hook in the only way it could be mended without patching, that he had discovered that it

was poor in quality, and that after he had mended it, but before it was taken from his shop, he notified one of the defendants that it was unsafe. His testimony about the ways in which the hook could be mended, in connection with all his testimony, had a bearing upon the condition in which the hook was.

The plaintiff's declaration alleged injuries to his legs, back and body, resulting in inability to labor. Physicians called by the plaintiff testified, under the defendant's objection and exception, to the condition of plaintiff's ankle at the time of the trial, as to the amount of stiffness that remained and, as experts, as to what effect the existing stiffness would have on the ability of the plaintiff to get about and work. The objection made to their testimony as to the condition of the plaintiff's ankle was solely that it was not admissible under the declaration. But the alleged injuries made this testimony admissible. It was not necessary to the admission of this evidence that the parts claimed to be injured should be described with anatomical nicety. The testimony as to the condition of the ankle at the time of the trial is presumed to have been connected with testimony as to the claimed injuries, since the bill of exceptions discloses nothing to the contrary, and since the objection was as is above stated. The objection to the testimony of the doctors as to what effect the existing stiffness would have on the plaintiff's ability to get around and work was that the subject-matter was not proper for expert evidence. But it would require an expert to tell the nature of the stiffness, the motions and actions that it would impede, if it would impede any, and the expert evidence was properly received. Whether such stiffness as was found resulted from muscular inflammation, from an injured tendon, from an impairment of the nerves of motion, or from voluntary control thereof by the plaintiff, or from some other cause, whether the rigidity was likely to be relieved or to be aggravated by exercise,

whether it was temporary or permanent in its nature, were all matters upon which the opinion of experts could properly be taken. What the expert testimony in fact tended to show does not appear from the bill of exceptions.

The plaintiff called one Lewis Gingras, who testified that he had been a painter for many years, that he had made great use of swing-stagings in outside painting, that during the painting season eight or nine men employed by him had used such stagings and that he had used hooks made from one and one-eighth inch iron as well as others. So far his testimony was of a qualifying character. He then testified to the way in which such stagings were attached to a building, that a staging supported by iron hooks of the size named would hold eleven hundred to twelve hundred pounds more or less, that he would guarantee it to hold that much and that it would be safe to have on one end of such staging supported by one hook "two or three men at least and the stock." Other painters testified to the same subject-matter. All of this testimony of the painters was received subject to objection and exception on the part of the defendants. We make no criticism here upon the use by Gingras of the word "guarantee." The word was inapt, but the jury could have attached no technical meaning to it. They must have understood it as a strong expression of opinion, and a majority of the Court think that the witness was properly testifying, not to the safety of swing-stagings in general, but merely to the normal strength of an iron hook of the diameter of the one which broke. In this view the reception of the evidence of Gingras was not error.

The plaintiff called two of the three defendants, and these two testified that all three "were interested in the farm and farming, and were partners under the firm name of John Crane & Sons." The defendants objected to this evidence on

the ground that the plaintiff was not entitled to inquire into the business relations of the defendants so long as he declined to elect whether he would proceed against them as individuals or as partners. To the reception of the evidence the defendants excepted. At another stage of the trial the defendants renewed their motion to have the plaintiff elect whether he would attempt to hold the defendants as individuals or as partners. The motion was overruled and the defendants excepted. In all that relates to this matter of election there was no error on the part of the court, and no more need be said in regard to that subject than is found in the opening part of this opinion.

The defendants called one Wood, a carpenter of long experience in putting up buildings, and asked him "whether swing-staging was safe and suitable for carpenter stagings for clapboarding a barn." This question was properly excluded. Counsel on both sides in argument before this Court take the position that the general safety of swing-stagings was a matter not properly in the case, and the charge of the court proceeded upon that ground. Besides the exceptions show no offer in connection with the question. *State* v. *Buck*, 74 Vt. 29, 51 Atl. 1087; *Fuller* v. *Valiquette*, 70 Vt. 502, 41 Atl. 579.

Subject to objection and exception by the defendants, evidence was introduced by the plaintiff tending to show his wages at times shortly before the occurrence of the injury in question. This evidence bore upon the question of damages and so was properly received.

The defendant, John, denied that the blacksmith, Myers, gave him the information testified to by Myers about the hook which broke. In this state of the testimony the defendants asked the said John this question: "What would you have done with this hook if Myers had told you that it was poor iron

and not safe?" The question was excluded and its exclusion was proper. The answer would have been mere conjecture.

The plaintiff claimed and his evidence tended to show that the defendant, Charles, supervised the work. The defendants' evidence tended to show that Charles had had no experience as a carpenter except on this job, and that the plaintiff had charge of the work and that Charles worked under him. As to George the exceptions recite that, "the evidence tended to show that the defendant, George Crane, had nothing to do with clapboarding or finishing the barn." In this state of the evidence the plaintiff was allowed under the objection and exception of the defendants to introduce evidence tending to show that the questions which came up as to the inside arrangements of the barn, including the location of the stable, were determined by the defendants, Charles and George, and not by the plaintiff. It is, in effect, claimed by the plaintiff that this evidence bore upon the question of who was actually overseeing the work of clapboarding which was in progress at the time of the accident. But the evidence had no such bearing. Assuming the fact to be that the defendants, Charles and George, determined the inside arrangements of their barn, such as the location of the stable and all that the phrase "inside arrangements" imports, this fact had nothing to do with the question of who was superintending the work of clapboarding at the time of the injury. The admission of this evidence was error and neither from the bill of exceptions nor from the briefs of counsel are a majority of the Court led to suppose that the error was harmless.

The defendants called the wife of the defendant, John Crane, and offered to show by her several matters material to the case. The offered evidence of Mrs. Crane was excluded, and the defendants excepted. With reference to the rulings of the court, excluding the testimony of Mrs. Crane, the bill

of exceptions refers to the entire case and makes the transcript thereof controlling. An examination of the transcript shows that the correctness of these rulings could only be determined by a critical examination of shifting and apparently conflicting evidence given by the same witness and by a determination of the attitude which counsel took in regard to the matter of the testimony offered. The subject of her right to testify came up at various times and in various ways and under various claims and concessions on the part of counsel for the defendants. This being so, and a reversal being necessary and the law as to the competency of husband and wife as witnesses being now different from what it was when this case was tried, it is uncalled for and would be unprofitable to decide, and it is not decided, whether upon any point or in anybody's favor, Mrs. Crane should have been allowed to testify.

Exceptions to a few other rulings relating to evidence, and exceptions to the charge of the court, all of which depended for their correctness upon the view taken of the evidence, are not here reviewed, either because the court was so clearly right as to make discussion uninstructive and, therefore, superfluous, or because the exceptions relate to matters which in no likelihood would arise on another trial.

At the close of all the evidence the defendants made a motion to have a verdict directed in their favor. This motion was a renewal of a motion made at the close of the plaintiff's evidence, and was overruled, the defendants excepting. Several grounds for the motion were assigned; but since a verdict will not be directed if one count is good, and there is evidence to support it, the motion rested upon two grounds, assumption of risks by the plaintiff, and contributory negligence on his part. With reference to these grounds we have examined the entire case and we find the evidence to be so conflicting as to the conduct of the plaintiff, and as to what he knew and com-

prehended or ought to have known and comprehended about this defective hook, that the motion for a verdict was properly denied.

After the jury had retired a small model of the barn which had not been received as an exhibit, and a painter's staging hook which had been used in the examination of some witnesses but had not been offered or received as an exhibit, were discovered in the jury room. Immediately thereupon the court called the jury into the court room and admonished them but did not discharge them from the consideration of the case. The defendants excepted to the action of the court in not then discharging the jury. After the verdict was returned the defendants moved to set it aside because of the discovery of the model and hook in the jury room. The court then took testimony and found that the jury had agreed upon a verdict for the plaintiff before the model and hook got into their possession, and without considering the statements of jurymen that the model and hook did not influence them in assessing damages, found that the model and hook could not have influenced the jurymen in determining damages. Thereupon the motion to set aside the verdict was overruled and the defendants excepted. Everything that the court considered in making this finding is before us and we hold that the finding was fully warranted. The exception to the refusal to discharge the jury, and the exception to the refusal to set aside the verdict avail nothing.

Judgment reversed and cause remanded.

EDWARD POMEROY *v.* GUY O. KELTON.

May Term, 1905.

Present: ROWELL, C. J., TYLER, MUNSON, START, WATSON, HASELTON, and POWERS, JJ.

Opinion filed November 23, 1905.

Quo Warranto—Misconduct of Petitioner.

A complaint for a *quo warranto* is addressed to the sound discretion of the Court, and it would be unbecoming for this Court to act on the complaint of a private relator, who stands as a wrongdoer in respect of the very thing in issue.

Where, on a complaint by a private relator for a *quo warranto* to try title to an office, for which relator and respondent were opposing candidates it appears that intoxicating liquor was, with some system and to considerable extent, furnished to voters at the election, while the polls were open, in the interest of the relator and through his connivance, the writ will be denied on the ground of public policy.

Quo Warranto, brought under V. S. Chap. 82, to the Supreme Court, Rutland County, May Term, 1905, and then heard upon the pleadings and evidence.

O. M. Barber, E. H. O'Brien, and *T. H. Brown* for the relator.

Butler & Moloney for the respondent.

HASELTON, J. This is a complaint in the nature of a *quo warranto* brought by Edward Pomeroy against Guy O. Kelton, asking judgment of ouster of the said Kelton from the office of alderman from the 11th ward of the city of Rutland, and judgment that the complainant was lawfully elected to and is now entitled to hold said office and to exercise the functions thereof. The election brought in review is that held in

Ward 11 of the city of Rutland on March 7, 1905, for the choice of an alderman and other officers.

At the election one hundred and sixteen votes for alderman were counted for the relator, Pomeroy, and one hundred and seventeen votes were counted for the defendant, Kelton, and the said Kelton was accordingly declared elected.

A large amount of evidence has been taken by which it is clearly established that at the election in question intoxicating liquor was, with some system and to a considerable extent, furnished to voters while the polls were open, and that this liquor was so furnished in the interest of the relator and through his connivance. This being so the relator does not come into Court with clean hands and the Court will not at the relator's instance inquire into the matters and things complained of by him.

The plying of voters with intoxicating liquors during voting hours, at any election, is contrary to the spirit of our constitution and laws and is manifestly obnoxious to public policy.

A complaint for a *quo warranto* is addressed to the sound discretion of the Court, and it would be unbecoming and demoralizing for this Court to act on the complaint of a private relator who stands as a wrong-doer in respect to the very thing in issue. The relator is asking the Court to aid him in securing an official position which he sought to obtain on election day by a course having a natural tendency to defeat the free and voluntary choice of the voters. For the Court to lend such aid would be a reproach to the law and to the administration thereof.

Had this complaint been preferred and prosecuted by the State's attorney for Rutland County other principles would be applicable, and the duty devolving upon the Court might be

different from that which we are now clearly bound to perform. *State* v. *Harris*, 52 Vt. 216.

The complaint is dismissed with costs.

FRANK LAMB *v.* MORRIS ZUNDELL.

May Term, 1905.

Present: ROWELL, C. J., TYLER, MUNSON, START, WATSON, HASELTON, and POWERS, JJ.

Opinion filed November 23, 1905.

Contracts—Consideration—Officer's Interest in Attached Property—Recovery of Price by Officer—Reference—Effect on Pleadings—Amendment to Conform with Proof—Trustee Process—Liability of Trustee—Pleading—General Issue—Evidence—V. S. 1374.

Where an officer, having attached certain iron on several writs, while the attachments were in force permitted the representative of the defendant in the attachment suits to sell the iron on the agreement of the purchaser with the officer to pay the latter the purchase price, the surrender of the officer's special property in the iron was a sufficient consideration for the purchaser's promise to pay; and the officer may recover against the purchaser, though his writs have been satisfied by execution sales of other property attached.

In general assumpsit by an officer to recover the purchase price of property sold after he had attached the same, the case having been referred by the parties, it was immaterial whether general assumpsit would lie, since by the reference the cause of action was referred, and the declaration was adaptable by amendment to the facts found, without changing the nature of the action.

Plaintiff, who was a deputy sheriff, having attached certain iron on several writs, permitted it to be sold on purchaser's agreement to pay the price to plaintiff. After having made plaintiff a partial payment, the purchaser was summoned as trustee in a suit against the attachment defendant, and suffered judgment therein by default, and paid the judgment. *Held*, that, plaintiff's writs having been satisfied out of other property, plaintiff, in an action against the purchaser for the price of the iron, was the "representative" of the attachment defendant, within the meaning of V. S. 1374, discharging a trustee from demands by a defendant for credits paid by force of a trustee judgment, and allowing the trustee, as against such defendant or his "representative," to give evidence of such special matter in discharge under the general issue.

GENERAL ASSUMPSIT. Plea, the general issue. Heard on the report of a referee and exceptions thereto at the June Term, 1905, Orange County, *Powers*, J., presiding. Exceptions overruled; and judgment on the report for the plaintiff for $197.52. The defendant excepted. The referee found that the trustee judgment paid by the defendant was $179.14.

C. H. Williams for the defendant.

The contract relied upon was without consideration moving from the plaintiff. It was a naked promise to pay him. *Hall* v. *Huntoon*, 17 Vt. 244; *Fugure* v. *Montreal So. of St. Jo.*, 46 Vt. 369; *Powers* v. *N. E. Fire Ins. Co.*, 69 Vt. 494; *Unity* v. *Allen*, 71 Vt. 381.

David S. Conant for the plaintiff.

ROWELL, C. J. The plaintiff, as deputy sheriff, had several writs in his hands against the Bradford Paper Company in favor of its creditors, whereon he attached certain real estate and some scrap iron as the property of the company. Thereafter, and while the attachments were in force, the defendant, to the knowledge and with the acquiescence of the plaintiff,

purchased the iron of one Homer, a member of said company, and at the same time it was understood and agreed by the plaintiff, the defendant, and Homer, that the money should be paid to the plaintiff, and the defendant then and there agreed to pay it to him, and subsequently did pay to him a considerable part of it, and would have paid the rest had he not been adjudged trustee in a suit against the company and paid the judgment.

It appears that the claims of all the attaching creditors whose writs the plaintiff served were fully paid and satisfied by execution sales of the real estate attached, so that the iron was thereby released from the attachments; and this we understand was before this suit was brought.

The defendant objects that the plaintiff cannot recover because the legal right is not in him. But at the request of the defendant, implied if not expressed, the plaintiff conferred a benefit upon the defendant by allowing him to purchase and have the iron, in which the plaintiff had a special property as attaching officer, and that benefit was a sufficient consideration for the defendant's promise, which was induced thereby, and made to the plaintiff and no one else.

But the defendant says that general assumpsit will not lie. It is immaterial whether it will or not, for if not, the declaration is adaptable by amendment to the facts found, without changing the nature of the action, the case having been referred by the parties, and thereby the cause of action.

The defendant did not appear and disclose when he was trusteed, but was defaulted and adjudged trustee and paid the judgment, and now seeks to avail himself of that payment under the general issue, to which the plaintiff objects that the defendant should have disclosed, and have pleaded the payment specially.

But as the claims of the attaching creditors have been fully paid and satisfied, the plaintiff is suing solely for the benefit of the defendant in the trustee suit, which is the Paper Company, and to which alone he is accountable for all he recovers here; and so he stands as its representative within the meaning of V. S. 1374, which discharges a trustee from demands by the defendant for credits paid by force of a trustee judgment, and allows him when afterwards sued therefor by the defendant or his representative, to give evidence under the general issue of the special matter in discharge.

Judgment reversed, and judgment for the plaintiff for $18.38, with interest thereon from the commencement of the suit.

J. D. STANLEY *v.* JONAS R. PAYNE.

May Term, 1905.

Present: ROWELL, C. J., TYLER, START, WATSON, HASELTON, and POWERS, JJ.

Opinion filed December 7, 1905.

Assault and Battery—Retaking Possession of Property—Justification.

The mere right of property, not coupled with the possession, will not justify the owner in using force and violence to obtain possession from one who wrongfully withholds it.

The facts that defendant, on the expiration of his lease of a farm, obtained the landlord's permission to leave a certain box in the barn on the premises, and thereafter defendant visited the farm and told the then tenant that the box was defendant's and that

he entered to take it, and the tenant refused to allow him to do so, are not sufficient to place the tenant in the attitude of a wrongdoer so as to justify defendant in the use of force and violence to get possession of his box.

TRESPASS for assault and battery. Pleas, the general issue, self-defence, and defence of personal property. Replications, *similiter* and *de injuria*. Trial by jury at the September Term, 1903, Rutland County, *Munson*, J., presiding. Verdict and judgment for the plaintiff. The defendant excepted. The opinion fully states the case.

Butler & Moloney for the defendant.

The defendant was justified. The person entitled to the possession of a chattel may take it from a wrongdoer by force; and he will not be liable to a civil action therefor, provided he used no more force than was necessary. *Johnson* v. *Perry*, 56 Vt. 703; *Hodgden* v. *Hubbard*, 18 Vt. 504; *Richardson* v. *Anthony*, 12 Vt. 373; *Yale* v. *Seeley*, 15 Vt. 221; *Sturvesant* v. *Wilcox*, 31 Am. St. 580; *Com.* v. *Donohue*, 148 Mass. 529; *Barnes* v. *Martin*, 82 Am. Dec. 676; *White* v. *Twitchell*, 25 Vt. 620; *Sterling* v. *Worden*, 51 N. H. 217; *Hemingway* v. *Hemingway*, 58 Conn. 433.

E. H. O'Brien for the plaintiff.

The mere right of property will not justify the owner in the use of force and violence to obtain possession. *Bliss* v. *Johnson*, 73 N. Y. 529; *Parsons* v. *Brown*, 15 Barb. 594; *Sampson* v. *Henry*, 11 Pick. 387; *Churchill* v. *Hulbert*, 110 Mass. 42; *Dustin* v. *Cowdry*, 23 Vt. 631; *Mussey* v. *Scott*, 32 Vt. 82; *Bowman* v. *Brown*, 55 Vt. 184; *Johnson* v. *Perry*, 54 Vt. 459; *Drury* v. *Hervey*, 126 Mass. 519; Cooley on Torts, p. 50; Cyc. of Law and Procedure, vol. 3, p. 1078; *Hodgden* v. *Hubbard*, 18 Vt. 504.

TYLER, J. Trespass for assault and battery; pleas, general issue, self-defence and defence of property; replication, *de injuria*.

The defendant had been a tenant of a certain farm, and it appeared that prior to April 1, 1902, when his term expired, he and one Pratt, the owner of the farm, agreed that a certain grain-box that belonged to the defendant should remain in the barn during that spring and that the defendant might remove it at any time after that season. The plaintiff, who succeeded the defendant as tenant, knew nothing of this agreement nor of the defendant's ownership of the box beside what the defendant told him just before the assault.

In September, 1902, the defendant drove to the farm for his box, when an affray took place between him and the plaintiff of which they were the only witnesses, and their testimony concerning it materially differed.

The plaintiff testified that the defendant drove up and stopped in front of the barn doors and said there was a box in the barn that belonged to him, and that he was going in to get it; that the plaintiff told him not to go into the barn because the plaintiff did not know whether the box belonged to the defendant or to Pratt, that when Pratt came up the plaintiff would inquire, and if the box belonged to the defendant, the plaintiff would draw it down to him and they would have no trouble; that the defendant said, with an oath, that he should go into the barn; that the plaintiff went into the barn and the defendant followed; that the plaintiff then told the defendant to leave the box where it was until Pratt came in, and if it was the defendant's he should have it; that the defendant took hold of the box and started to draw it towards the barn door, and at the same time the plaintiff seized hold of the opposite side of it and pulled it backwards; that the defendant pulled it along and as he pulled it a little piece of it came off

which the defendant threw down and again took hold of the box; that the defendant pulled it along two-thirds of the way across the barn floor, when the plaintiff told the defendant that he was not going to pull it any further, but the defendant kept pulling it along, and the plaintiff said, "Now leave it alone," and then the defendant knocked him down and jumped upon him.

The defendant testified that upon coming into the barn he told the plaintiff that the box was his, that he had a right to it and that he proposed to take it, whereupon the plaintiff pulled it back and broke a board off of it, and that the defendant continued to draw it toward the door; that the plaintiff then assaulted him, seizing him by the neck and shoulder, and that he resisted this assault, seizing the plaintiff and throwing him down upon the floor of the barn and holding him there a short time, whereupon the plaintiff said he would cease fighting, and that the defendant then took the box and carried it home.

The defendant requested the court to charge as follows: "If the jury find that the box was the property of the defendant and that it was left on the premises of Pratt for his accommodation, with the understanding and agreement that the defendant could go there and get it whenever he saw fit to do so, then he had the right to go into the barn and take it, and this would be so notwithstanding any protest or notice on the part of the plaintiff not to do so."

The court charged that neither the defendant's ownership of the box nor the plaintiff's occupancy of the barn was the controlling fact in the case; that a man who owned personal property and was in possession of it, might justify an assault to maintain his possession, but if the possession were in another person the owner could not justify an assault upon that

person to enable the owner to obtain the possession. A more specific instruction was:

"The box being in the barn which was in the occupancy of the plaintiff, was in the plaintiff's possession to start with, and the defendant could not justify an assault to take it out of that possession thus arising from the fact that it was in the barn which was in the plaintiff's occupancy. But if the defendant entered the barn without opposition or resistance on the part of the plaintiff, and so being in the barn, obtained complete manual possession and control of the box without committing any assault upon the plaintiff, the box would then be in the possession of the defendant, although still within the plaintiff's barn, and the defendant could then justify an assault upon the plaintiff to keep possession of it, if the plaintiff then undertook to take it away from him." * * * Further that: "If the defendant has failed to make out his justification, then the plaintiff will be entitled to a verdict, because of the fact, conceded by the defendant, that he laid hands upon the plaintiff. The real question is whether he was justified in doing this, because of the previous assault of the plaintiff, or for the protection of the personal property in his possession."

The defendant contends that there was error in the court's omission to charge as requested and in the charge as given.

The decisions upon the question here presented are somewhat at variance. In the notes to *Barnes* v. *Martin*, 82 Am. Dec. 670, Mr. Freeman says: "Whether the owner of personal property, or the one entitled to its possession, has the right under any or all circumstances to retake it, if it is wrongfully taken or detained from him, is an interesting question and one of some practical importance, but strange to say, it is one to which the law as yet gives no certain answer." It is apparent, however, that many of the decisions differ from each other

only in applying the rules of law to the circumstances of given cases.

Yale v. *Seeley et al.*, 15 Vt. 221, supports the defendant's contention. There the defendants went to the plaintiff's land with teams for the purpose of drawing away a quantity of poles lying upon the land. Both parties claimed to own the poles, but the decision went upon the ground that the defendants in fact owned them; and it was held that they had a legal right to enter upon the plaintiff's land to remove their property, and that if the plaintiff attempted to hinder them in the enjoyment of the right, the defendants were justified in using as much force as was necessary to overcome the hindrance. *Sterling* v. *Worden*, 51 N. H. 217, is like *Yale* v. *Seeley* in its facts and sustains the same doctrine.

The defendant also claims *Richardson* v. *Anthony*, 12 Vt. 273, as an authority. In that case the defendant's cattle were in the plaintiff's close without the fault of either party. The plaintiff did not claim to hold them as estrays and, as the court said, he did not and could not have owned them, yet he forbade the defendant's breaking the close to get them and claimed to own them himself; held, that the defendant was justified in breaking the close and in taking his property, but no force was used. Bennett, J., dissented, and Williams, C. J., remarked in the opinion that, "The right of the owner of personal chattels to enter on the possession of another to reclaim property, may depend entirely on the manner in which the possession was obtained." Whether the court would have justified the defendant in using all necessary force to overcome the plaintiff's resistance, if he had resisted, or held that the defendant should have resorted to an action at law, is a matter of conjecture.

This question was before the court in *Kirby* v. *Foster*, 17 R. I. 437, 22 Atl. 1111, and Stiness, J., said: "Unquestion-

ably, if one takes another's property from his possession, without right and against his will, the owner or person in charge may protect his possession, or retake the property, by the use of necessary force. He is not bound to stand by and submit to wrongful dispossession or larceny when he can stop it, and he is not guilty of assault, in thus defending his right, by using force to prevent his property from being carried away. But this right of defence and recapture involves two things: *First,* possession by the owner; and, *second,* a purely wrongful taking or conversion, without a claim of right. If one has intrusted his property to another, who afterwards, honestly, though erroneously, claims it as his own, the owner has no right to retake it by personal force. If he has, the action of replevin and trover in many cases are of little use. The law does not permit parties to take the settlement of conflicting claims into their own hands. It gives the right of defence, but not of redress. The circumstances may be exasperating; the remedy at law may seem to be inadequate; but still the injured party cannot be arbiter of his own claim. Public order and the public peace are of greater consequence than a private right or an occasional hardship. Inadequacy of remedy is of frequent occurrence, but it cannot find its complement in personal violence."

The general rule is that a right of property merely, not joined with the possession, will not justify the owner in committing an assault and battery upon the person in possession, for the purpose of regaining possession, although the possession is wrongfully withheld. *Bliss* v. *Johnson,* 73 N. Y. 529; *Barnes* v. *Martin,* 15 Wis. 240.

It was also held in *Churchill* v. *Hulbert,* 110 Mass. 42, that though the defendant had an irrevocable license from the plaintiff to enter upon his land and remove certain personal

property that belonged to the defendant, yet if the plaintiff resisted the entry, under a claim that the defendant had already removed all the property that was his, he had no right to use personal violence to overpower the plaintiff's resistance and enforce his claim.

In *Hodgden* v. *Hubbard,* 18 Vt. 504, the plaintiff bought a stove of the defendant through false and fraudulent representations as to his solvency and means of paying for it; held, that he acquired no right either of property or possession in the stove and that the owner was justified in pursuing him and retaking the property in the highway and in using as much force as was necessary in overcoming the purchaser's resistance. In *Johnson* v. *Perry,* 56 Vt. 703, where the plaintiff went into the defendant's millyard and, without right or license, loaded the *defendant's* slabs upon the plaintiff's sled, it was held that the defendant might use such force as was necessary to retake his property. Neither of these cases is authority for the defendant, for in each the taking was wrongful.

In the first trial of *Johnson* v. *Perry,* both parties claimed to own the wood, but the defendant admitted that the plaintiff had peaceably entered his, the defendant's premises, and got possession of it by loading it upon his sled. This Court correctly held in that case, 54 Vt. 459, that if the slabs were the plaintiff's, he, having possession of them, "had the right to maintain that possession against the defendant and every one else"; therefore that decision is not in point for the defendant. In both opinions in *Johnson* v. *Perry* the court referred to *Yale* v. *Seeley* and *Richardson* v. *Anthony* as authorities, which, we think, was inadvertence, for the rule in these cases was applied to different facts from those that appeared in *Johnson* v. *Perry* and went beyond what was necessary for the decision of that case. Judge Redfield, in his opinion in *Dustin*

v. *Cowdry*, 23 Vt. 631, evidently doubted the soundness of the doctrine laid down in the two early cases above cited.

In the present case the plaintiff had not wrongfully taken nor wrongfully withheld the defendant's property when the latter undertook to recover it. The case does not even show a demand for it by the defendant and a refusal by the plaintiff to deliver it, but a declaration by the defendant that the box was his and that he should take it, which was not sufficient to place the plaintiff in the attitude of a wrongdoer and justify the defendant in the use of force and violence to get possession of the chattel. In the opinion of a majority of the Court the rule stated in the Rhode Island case should be applied to the facts in the case at bar, rather than the rule in *Yale* v. *Seeley*.

The request to charge was properly denied and the charge as given was without error. *Yale* v. *Seeley*, so far as it conflicts with the views herein expressed, is no longer to be regarded as authority upon this subject.

Judgment affirmed.

Rowell, C. J., dissents.

DENNIS MAHONEY'S ADMR. v. RUTLAND RAILROAD CO.

October Term, 1904.

Present: ROWELL, C. J., MUNSON, START, WATSON, and HASELTON, JJ.

Opinion filed January 26, 1906.

Master and Servant—Injuries to Servant—Concurrent Negligence of Vice Principal and Fellow Servant—Sufficiency of Evidence.

In an action for the death of a railroad engineer, caused by the collision of a regular train with a train running on special orders, evidence *held* insufficient to show negligence on the part of the train dispatcher.

It is the duty of a railroad company to exercise, through some system of rules and service, a reasonably efficient supervision of its tracks and trains, with a view to lessening the perils incident to the operation of its complicated organization by fallible agencies.

An engineer on an extra train received completed orders from the train dispatcher at 5:06 to proceed to the next station south and immediately entered his time of leaving at 5:10 in a register kept for that purpose and which lay close to the local telegraph operator. The telegraph operator failed to transmit the report of the departure to the train dispatcher in accordance with the rules of the railroad company. A regular north bound train left the station to which the extra was running at 5:18. The stations were only about seven miles apart, and the two trains collided, thereby causing the death of the engineer on the regular train. *Held*, that the failure of the telegraph operator to report the departure of the extra train, so that the train dispatcher could have held the regular train at the south station, was the proximate cause of the accident.

CASE for negligence. Plea, the general issue. Trial by jury at the March Term, 1904, Rutland County, *Tyler*, J., presiding. Verdict and judgment for plaintiff. The defendant excepted.

Plaintiff's intestate was the engineer on the engine drawing the "Flyer." On January 2, 1903, Cowee was the engineer running engine numbered 192, which was drawing a train from Rutland to Shelburne, and one Parris was the conductor of said train. This train left Rutland on said day about 7:30 o'clock A. M., under an order of the train dispatcher to run extra to Middlebury. On its arrival at Middlebury, it received another order to run extra to Burlington. This train was distributing salt and coal to stations from Rutland to Shelburne. It reached Shelburne about 3:30 P. M., and on completing its work at that station would return to Rutland; but it was necessary for Cowee to turn his engine, take water, and clean his fire before starting back to Rutland, and, as there was no turn-table at Shelburne, it was decided to run down to Burlington, which was the station next north from Shelburne. Before leaving Shelburne for Burlington, Parris and Cowee consulted the time-table of regular trains and found that trains numbered 21 and 27, which were scheduled on said time-table and were then moving north, were then overdue, and had not then arrived at Shelburne, and that train numbered 65 on said time-table and known as the "Flyer" was moving north, and was due to leave Shelburne at 5:18 P. M. Cowee went to Burlington with his engine 192, having with him on his engine one Chase as fireman and one Cockran as brakeman, and went to the freighthouse, which was situated in the freightyard, and which was the proper place to report his arrival and to ask for orders, if any were needed. He registered his arrival at Burlington at 4:50 P. M., in a book kept at said freighthouse for that purpose; and then asked the train dispatcher at Rutland, through Tynan the telegraph operator at Burlington, for orders.

Said train dispatcher thereupon sent to Cowee the order which is quoted in the opinion, and which was taken off the

wires by Tynan, read by him to Cowee, repeated back by Tynan to the train dispatcher, who gave the O. K. signal and made the order complete at 5:06 P. M., and Tynan then delivered a copy of the order to Cowee, who thereupon registered in the book aforesaid, under the column headed "departure," the figures "5:10." This entry of departure was not reported to the train dispatcher at Rutland until after midnight, as the collision broke down the wires so that they were not available till near midnight. Cowee with his engine 192 left Burlington for Shelburne at 5:10 P. M., or as soon thereafter as he could get off. The "Flyer" left Shelburne at 5:18 P. M. The distance from Burlington to Shelburne is between six and one-half and seven miles. At a point about one and one-third miles north of Shelburne the "Flyer" collided with Cowee's said engine, and thereby plaintiff's intestate and his fireman, on the engine drawing the "Flyer," and said Cowee were instantly killed, and said Chase and Cockran received injuries whereof they died within an hour or two after the collision. No claim was made that plaintiff's intestate was in fault in any respect.

At the close of the evidence defendant moved for a verdict on the ground that the evidence did not show any negligence of defendant which caused the death of plaintiff's intestate; and if such death was caused by the negligence of Cowee, or by that of Tynan, or by that of both combined, that both Cowee and Tynan were fellow servants of Mahoney; and that the negligence of Cowee, in moving his engine onto the main line in violation of the rules and of the law of the State, was the proximate cause of Mahoney's death.

The court overruled this motion, to which defendant excepted.

H. H. Powers, P. M. Meldon, and *F. S. Platt* for the defendant.

Cowee was the fellow servant of Mahoney. Cowee's negligent act was not authorized by the defendant, and was the proximate cause of the accident; therefore defendant's motion for a verdict should have been granted. 2 Labatt, Master and Serv. 1364, 1758-1765; *Howard* v. *Denver & R. G. R. R. Co.,* 26 Fed. 837; *Oakes* v. *Mase,* 165 U. S. 363; *B. & O. R. R.* v. *Camp,* 65 Fed. Rep. 952; *Railway Co.* v. *Clark,* 6 C. C. A. 281; *Illinois C. R. R.* v. *Bentz,* 99 Fed. Rep. 657; *Oregon Short Line & U. N. Ry. Co.* v. *Frost,* 74 Fed. Rep. 965; *McKaig* v. *Northern Pac. R. Co.,* 42 Fed. Rep. 288; *Northern Pac. Ry. Co.* v. *Dixon,* 194 U. S. 338.

It is the master's duty to use proper diligence in selecting competent servants. He does not *warrant* competency. *Baulec* v. *R. R. Co.,* 59 N. Y. 356; *Baltimore Elev. Co.* v. *Neal,* 65 Md. 438; *Reiser* v. *R. R. Co.,* 152 Pa. St. 38.

The presumption is that Tynan was competent. *Hermann* v. *Port etc. Co.,* 71 Fed. 853; Elliott Railroads, § 1286.

Butler & Moloney for the plaintiff.

It is the duty of the master to use reasonably careful supervision, with a view of eliminating unnecessary perils from the business. *Noyes* v. *Smith,* 28 Vt. 62; *Houston* v. *Brush,* 66 Vt. 349; *Davis* v. *C. V. R.,* 55 Vt. 84; *McGovern* v. *C. V. R. Co.,* 123 N. Y. 281; *Chicago etc. R. Co.* v. *Taylor,* 18 Am. Rep. 625; *Galveston etc. R. Co.* v. *Smith,* 76 Tex. 611; *Darrigan* v. *R. R. Co.,* 52 Conn. 285; *Mo. etc. R. Co.* v. *Elliott,* 18 Am. & E. R. R. Cas. N. S. 732; *Hawkins* v. *R. R. Co.,* 142 N. Y. 421.

The local telegraph operator was a vice-principal. *Frost* v. *Oregon etc. R. Co.,* 69 Fed. 936; *Madden* v. *C. & O. R.*

Co., 57 Am. Rep. 698; *Sheehan* v. *New York etc. R. Co.*, 91 N. Y. 332; *Pittsburg, etc. R. Co.* v. *Henderson*, 37 Ohio St. 549; *McLeod* v. *Ginther's Admr.*, 80 Ky. 399; *Hunn* v. *Mich. Cent. R. Co.*, 41 A. & E. R. C. 452; *G. T. R.* v. *Cummings*, 106 U. S. 700; *C. & N. W. R. Co.* v. *Sweet*, 45 Ill. 197; *Felton* v. *Harbison*, 104 Fed. 737; *Madden* v. *C. & O. R. Co.*, 57 Am. Rep. 698.

MUNSON, J. The court treated the train dispatcher as a vice principal of the defendant, and no question was or is made as to the correctness of this view. The court definitely instructed the jury that Cowee, the engineer of the extra train, was a fellow servant of plaintiff's decedent, and in connection therewith explained the rules applicable to that relation. The case was submitted upon grounds which assumed that Tynan, the telegraph operator at the Burlington freightyard, was also a fellow servant of the deceased. The only questions left to the jury regarding Tynan were whether he was a competent operator; and if not, whether his incompetency caused the collision; and if it did, whether the defendant was negligent in employing him. If there was a failure in this connection to distinguish sufficiently between a mere act of neglect and the result of incompetency, no exception was taken to it.

The only other question submitted was whether the dispatcher was negligent in not taking further action after completing the order which allowed Cowee to run south from Burlington; and the only bearing given to the question of Tynan's competency was upon his failure to report Cowee's departure, and the effect of that failure on the action and responsibility of the dispatcher. The order was received by Tynan at five o'clock, and was thereupon made known to Cowee and repeated to the dispatcher, but was not made complete and effective by the dispatcher's reply until 5:06. The

north bound train known as the "Flyer" was due to leave Shelburne at 5:18. Cowee entered his time of leaving as 5:10, in a register that lay close by Tynan. The rules of the defendant required its operators to promptly record and report to the train dispatcher the time of departure of all trains. Tynan did not attempt to report Cowee's departure before 5:18.

The plaintiff contends that the dispatcher's delay of nearly six minutes in completing the order, in connection with the Flyer's time of leaving Shelburne, produced a situation which made it his duty to give further instructions; that it was at least his duty, when he failed to receive a speedy report of Cowee's departure, to inquire in regard to it; and that in any event, if Tynan had promptly reported Cowee's time of leaving as registered, the dispatcher could have held the Flyer at Shelburne and prevented the collision. The court gave no definite construction to this order, and no instruction as to what it gave Cowee the right to do, but left it for the jury to say whether the dispatcher ought to have anticipated that Cowee would leave when the order was made effective, and have held the Flyer at Shelburne.

The defendant contends that Cowee's departure was in direct violation of the order when read in connection with the rules, and that there was nothing in the situation that called for further action on the part of the dispatcher. The order received by Cowee was as follows: "Engine 192 will run extra Burlington to Rutland; will meet train 21 at Vergennes and 27 at New Haven Junction." This order is in the form which the rules prescribe for extra trains, and under the form as embodied in the rules is the following direction: "A train receiving this order * * must keep clear of all regular trains, as required by rule." Rule 86 provides that an inferior train must keep out of the way of a superior train; and Cowee's

train was inferior to the Flyer. So this was not an order for Cowee to leave Burlington at once, or at any particular time. It operated merely as a clearance, which permitted him to leave subject to the rule. It authorized him to run from Burlington to Rutland, going from station to station as he might be able to without getting upon the schedule time of regular trains. The dispatcher had a right to assume that the train would be run in this manner, unless there was something in the situation as known to him which ought to have led him to expect the contrary.

We find nothing in the circumstances disclosed by the evidence that tends to charge the dispatcher with a further duty. The fact that the order was sent six minutes before it was put in force could not have been expected to confuse a competent engineer. The dispatcher could properly assume that the engineer would determine his action with reference to the time left available by the completed order. The distance from the Burlington freightyard to Shelburne is not less than six and one-half miles. An extra is not only required to keep off the time of regular trains, but is required to allow five minutes at the place of meeting for taking the siding and closing the switch. This required that Cowee be at Shelburne at 5:13, and making the least possible allowance for getting started after the order was made complete, it would require a run of over a mile a minute; and if a use of three of the five minutes allowed for side-tracking had been contemplated, it would then have required a speed of over forty miles an hour. But the dispatcher was not bound to anticipate such a gross violation of the five minute rule, and without this it is clear that ordinary caution could not have anticipated a departure. Moreover, the question whether a train of this character can get off in season to reach another station within the time al-

lowed by the rules will often depend upon local conditions which are known to the trainman in charge, but cannot be known to the dispatcher. These may include the location of the train in the yard, the number of switches to be passed in reaching the main track, and the condition of the yard as regards other movements. Inasmuch as an extra is required to protect itself against regular trains, it is evident that the starting of such a train must be left, within proper limits, to the judgment of the one in charge of it. In these circumstances, there was nothing in the failure to receive a report of Cowee's departure to excite the dispatcher's apprehension. So we find nothing in the evidence that tends to show negligence on the part of the dispatcher.

It remains to consider the bearing of Tynan's conduct upon the question of liability. There was evidence tending to show that Tynan was ignorant of what the rules required of him in regard to reporting the departure of trains, and that the defendant was negligent in failing to ascertain it. This required the submission of the case to the jury, if there was evidence tending to show that the accident was due to Tynan's omission operating concurrently with Cowee's negligence. So it is necessary to inquire as to the results that would probably have flowed from a prompt report of Cowee's departure as registered.

If Tynan had acted at 5:08, this would have given ten minutes in which to stop the Flyer at Shelburne; an allowance which would probably have covered all chances of delay in the dispatcher's office and at Shelburne. There was evidence tending to show that one purpose of the rule requiring a prompt report of departures is to keep the dispatcher constantly advised of the actual condition of the main line, and that one benefit contemplated from the requirement of prompt trans-

mission is the additional protection thus afforded. It is clear that if the dispatcher had received information which indicated that Cowee was actually leaving for Shelburne on the Flyer's time, it would have been his duty to take measures to prevent the threatened collision. The rules governing the movement of the train would not justify his failure to act, if he had knowledge that the rules were being ignored. So the question will be, what would the dispatcher have understood from the report, if it had been made? It seems that it is customary for trainmen acting in these circumstances to enter their time of departure somewhat in advance of the time of registering, to give them time to get to their trains and work out to the main line; and that unexpected delays sometimes prevent their getting off within the time they allow. But if Cowee was intending to wait for the Flyer, his time of departure depended upon a certainty and not a contingency. The time he set for leaving was 5:10. The Flyer was due at Burlington station, about one-fourth of a mile north of the freightyard, at 5:30. So the time given for leaving was at least 18 minutes before he could leave, if he was to wait for the Flyer. It is to be presumed that on receiving such a report, the dispatcher would have acted prudently and have done his duty. Ought he to have understood that Cowee had entered this time for leaving expecting to wait for the Flyer? Or ought he to have understood that he was leaving for Shelburne in disregard of the rules? This was a matter for the jury, and justified the submission of the case, unless it be held that the negligence of Cowee was the sole proximate cause of the accident and that of Tynan only a remote cause.

We think that upon the case which the plaintiff's evidence tended to establish, Tynan's failure to report was one of two causes which concurred directly in producing the accident. It

is true that the defendant had no part in creating the dangerous situation from which the accident resulted. That situation was developed by the negligent act of Cowee. But it was the defendant's duty to exercise, through some system of rules and service, a reasonably efficient supervision of its track and trains, with a view to lessening the perils incident to the operation of a complicated organization by fallible agencies. The first neglect consisted in Cowee's leaving, but the neglect of Cowee and the neglect of the defendant afterwards came into a concurrent operation which continued until the injury was received,—Cowee running on the Flyer's time, and the dispatcher improperly left in ignorance of it when a knowledge of it would have enabled him to prevent the accident. Into the situation which existed at the time of the collision there had come the further element of the dispatcher's failure to hold the Flyer at Shelburne when he ought to have had information that an opposing train was on the track. So Tynan's failure was a proximate cause of the accident.

The motion to direct a verdict for the defendant was properly overruled, but the court erred in its submission of the questions touching the dispatcher's duty.

Judgment reversed and cause remanded.

In Re Julia F. Woodward's Estate.

May Term, 1903.

Present: Munson, Start, Watson, Stafford, and Haselton, JJ.

Opinion filed January 26, 1906.

Wills—Pecuniary Legacies—Interest.

Pecuniary legacies draw interest after one year from the death of the testator, unless the will provides otherwise.

This rule applies notwithstanding the fact that the final settlement of the estate is delayed by litigation instituted by the legatees who claim the interest.

Appeal from the final decree of the Probate Court distributing the estate of Julia F. Woodward. She deceased at Westminster, September 29, 1899, leaving a will which was duly probated by the Probate Court within and for the district of Westminster in the State of Vermont, on the third day of February, 1900. Ira B. Holton, Abbie I. Buck, and Anna O. Phelps, who were heirs at law of the deceased and also legatees under said will, appealed from the probate and allowance of said will, which appeal is dated February 8, 1900. The cause was tried by jury at the September Term, 1901, of Windham County Court, and resulted in a verdict and judgment establishing said will. Exceptions were taken by said contestants to the Supreme Court. While the case was pending in Supreme Court, said exceptions were waived, and on December 12, 1901, said judgment of the county court establishing said will was affirmed and certified to said Probate Court. Such proceedings were then had in said Probate Court that said court made a final decree of distribution of said estate on the theory that the specific cash legacies should draw interest after one year from the death of the testatrix. From this

decree the executor of said will appealed to the Windham County Court. Said court, at the April Term, 1903, *Tyler,* J., presiding, rendered judgment on the theory that said legacies should draw interest after one year from the final establishment of said will be said judgment of the Supreme Court. To this judgment said legatees excepted.

E. L. Waterman, J. L. Martin, and *E. W. Gibson* for the legatees.

Where no time is fixed by the will, in the absence of statute, a legacy is payable at the expiration of a year from the testator's death, and draws interest from that time. 18 Am. & Eng. Enc. 792, 793; *Marsh* v. *Hagen,* 1 Edw. Ch. 174; *Rotch* v. *Emerson,* 105 Mass. 431; *Webster* v. *Hale,* 8 Ves. Jr. 410; *Wood* v. *Penoyre,* 13 Ves. Jr. 333; *Loring* v. *Woodward,* 41 N. H. 391; *Ayer* v. *Ayer,* 128 Mass. 577; *Smith* v. *Lambert,* 30 Me. 140; *Ogden* v. *Pattee,* 140 Mass. 82; *Benson* v. *Maude,* 6 Madd. 15; *Sitwell* v. *Bernard,* 6 Ves. Jr. 539; *State* v. *Crossby,* 69 Ind. 203; *Tichenor* v. *Tichenor,* 4 N. J. Eq. 39; *Hart* v. *Williams,* 77 N. C. 426; *Moore* v. *Davidson,* 22 S. C. 92; *Welch* v. *Adams et al.,* 9 L. R. A. 244; *Davis* v. *Crandall,* 101 N. Y. 311; *Kent* v. *Dunham,* 106 Mass. 586; *Miller* v. *Congdon,* 14 Gray 114; *Thorn* v. *Garner,* 113 N. Y. 203; *Pollard* v. *Pollard,* 1 Allen 390; *Dawes* v. *Swan,* 4 Mass. 208.

This rule will not yield even if the legatees have delayed the settlement of the estate by litigation. *Welch* v. *Adams et al.,* 9 L. R. A. 244; *Kent* v. *Dunham,* 106 Mass. 586; *Powell* v. *Drake,* 19 D. C. 338.

C. C. Fitts and *Arthur C. Spencer* for the estate.

As the accounts filed in this case show, the estate yielded less than three per cent. on its funds. Now, if the contention of these specific legatees is sustained it results in their getting six per cent. interest on their legacies during the time they were themselves making an unsuccessful contest to hold up the estate, which can only secure less than three per cent. It is easy to see that conditions might arise with bequests of large enough size in which it would be to the advantage of interested parties to make a contest simply for the gain in interest that would result from it. The equitable and reasonable rule is that interest on these legacies to the defendants should commence one year after the final establishment of the will.

MUNSON, J. The case calls for a determination of the time from which interest should be allowed on legacies given without testamentary provision governing the allowance. The final allowance of the will which gave the legacies in suit was delayed by an appeal from the decree of the Probate Court and the taking of exceptions to the Supreme Court. The county court allowed interest after the expiration of one year from the time when the will was finally established.

This Court has undertaken to state the rule governing the allowance of interest on legacies in two cases of comparatively recent date—*Bradford Academy* v. *Grover,* 55 Vt. 462; and *Baptist Convention* v. *Ladd,* 58 Vt. 95, 4 Atl. 634. In neither of these cases was the Court called upon to determine the rule. In *Bradford Academy* v. *Grover,* it was said that legacies ordinarily draw interest after one year from the death of the testator; but there the will directed the payment of interest after the happening of a certain event, and the scope of the decision was merely that the general rule may be controlled by an express provision of the will. In *Baptist Con-*

vention v. *Ladd,* the Court stated the rule as follows: "Legacies in this State, unless otherwise controlled by the will, draw interest after one year from the probate of the will." In this case the legacy had been paid, and the Court held that the payment was so made and accepted that there was an accord and satisfaction. The payment was long after the expiration of one year from the probate of the will, and no interest whatever was included in the payment. It being considered that no interest was recoverable, it was not necessary to determine the amount, and no use was made of the rule as stated. There are some well established exceptions to the general rule, one of which was considered in *Smith* v. *Moore,* 25 Vt. 127; but a review of these exceptions is not essential to our inquiry.

The rule adopted by the ecclesiastical courts, which has become the settled rule of the common law, requires the payment of interest after one year from the death of the testator. But in states where the statute allows one year from the granting of letters for the payment of debts and legacies, it is generally, but not universally, held that legacies draw interest only after the expiration of a year from the issuance of the letters. Some of these statutes are specific as regards the time of payment, while others are similar to ours. Our statute does not itself fix a time for the payment, nor forbid the payment before a specified time, but authorizes the Probate Court to allow a time which shall not in the first instance exceed one year, and provides for an extension of the time when the circumstances of the estate require it. We think that statutes of this character were not intended to change the rule regarding the allowance of interest on legacies. This view was taken, and persisted in, by the more prominent Surrogate Courts of New York, until the contrary was unmistakably adjudged by the Court of Appeals. *Matter of McGowan,* 124 N. Y. 526.

The same view was afterwards taken by the New Jersey Court, in an opinion based expressly upon the reasoning of the New York surrogates. *Davison* v. *Rake,* 45 N. J. Eq. 767.

It has always been considered that convenience requires the adoption of some definite general rule to govern cases of this class, and it has always been conceded that any rule that may be adopted will work some inequality, and perhaps hardship, in exceptional cases. Courts have therefore been content to adopt such rule as seemed to them most likely to prove reasonable and convenient in cases generally. It seems unnecessary to consider the various reasons that have been advanced in support of the rule which determines the time by the death of the testator. It may be that some of them have little force when the rule is applied in connection with the administration laws generally prevailing in this country. But the rule has certain advantages which we consider sufficient to overcome all objections. It bases the allowance of interest upon an initial point that cannot be moved by the various accidents of settlement; and thus enables a testator to give certainty to his bequests without the use of special provisions. It accords substantially with what may properly be considered the intention of a testator whose will is silent as to interest; for it is doubtless true that wills are ordinarily made in expectation of the usual course of settlement. But if the probating of the will or the granting of letters is made the controlling factor, the value of a bequest may be lessened by a postponement of payment without interest, on the happening of a great variety of contingencies which the testator cannot be supposed to have had in contemplation. When this takes place the scheme of the ordinary will is reversed, and the more favored bequests are lessened in value to increase the residuum.

Whatever the rule in this State may have been heretofore, we hold that pecuniary legacies draw interest after one year from the death of the testator, unless the will provides otherwise.

This case cannot be made an exception on the ground that the contest which delayed the settlement of the estate was participated in by the legatees who are claiming the interest. *Kent* v. *Dunham,* 106 Mass. 590.

Judgment reversed, and judgment for the face of the legacies with interest after one year from the death of the testatrix; to be certified.

IN RE JULIA F. HICKOK'S ESTATE.

October Term, 1904.

Present: ROWELL, C. J., TYLER, MUNSON, WATSON, and POWERS, JJ.

Opinion filed January 26, 1906.

Inheritance Tax—Nature of Exemptions—Foreign Corporations—Constitutional Law—Uniformity and Equality of Taxation—No. 46, Acts 1896.

The acquisition of property by descent or by will is not a natural right, but a privilege accorded by the State, which has the power both to determine the devolution of estates, and to exact a just and proportional contribution as they pass.

Inheritance taxes are not taxes upon property, but taxes upon the transmission of property, and are not in contravention of constitutional provisions requiring uniformity and equality of taxation.

Exemptions from taxation are to be strictly construed, and no claim of exemption can be sustained unless within the express letter or the necessary scope of the enacting clause.

No. 46, Acts 1896, entitled "An act to tax collateral inheritances," exempts from its operation property passing "to or for charitable, educational or religious societies or institutions, the property of which is exempt by law from taxation." *Held*, that this exemption is confined to societies the property of which is exempt from taxation by the laws of this State, and has no application to institutions incorporated by and located in other states.

Exemptions from taxation are not in contravention of constitutional provisions requiring uniformity and equality of taxation.

APPEAL from the final decree of the Probate Court distributing the estate of Julia F. Hickok, and holding that five foreign religious societies, who were legatees, were exempt from the collateral inheritance tax imposed by No. 46, Acts 1896. Heard on an agreed statement at the March Term, 1904, Chittenden County, *Munson*, J., presiding. Judgment, *pro forma*, that said legacies are subject to said tax. Said estate excepted.

The agreed statement shows that the five bequests in question were as follows: $3000 to the Hampton Normal and Educational Institute, a Virginia corporation located at Hampton in that State, and $6384.78, to each of the following societies: The Congregational New West Educational Commission, an Illinois corporation located at Chicago; The Congregational Home Missionary Society, a New York corporation located at the city of New York; The American Board of Commissioners for Foreign Missions, a Massachusetts corporation located at Boston; and The American Missionary Association, a New York corporation located in the city of New York. The agreed statement further shows that these corporations are charitable, religious, or educational institutions, and that by

the laws of their respective states their property is, respectively, exempt from taxation.

W. L. Burnap for the estate.

Had the Legislature intended to restrict the exemption to domestic corporations, the word "statute" would have been used in the description of the corporations to be exempted, rather than the word "law." *White* v. *Howard,* 46 N. Y. 144; *In Re Prime,* 18 L. R. A. 713; Black, Int. Statutes, 48, 56; *Alfred University* v. *Hancock,* 46 Atl. 178; *State* v. *Johnston,* 46 Atl. 776; *State* v. *Brackley,* 50 Atl. 589.

The statute in question is in contravention of our Constitution requiring uniformity and equality of taxation. Constitution of Vermont, Ch. 1, Arts. 1, 2, 9; *Oliver* v. *Washington Mills,* 11 Allen 274; *Portland Bank* v. *Apthrop,* 12 Mass. 252; *Com.* v. *Bank,* 5 Allen 431; *Curry* v. *Spencer,* 61 N. H. 589; *State* v. *Express Co.,* 60 N. H. 219.

J. E. Cushman, Commissioner of State Taxes, for the State.

The exemption in question is confined to societies the property of which is exempt from taxation by the laws of this State. *Minot* v. *Winthrop,* 162 Mass. 113; *Rice* v. *Bradford,* 180 Mass. 545; *Matter of Prime,* 136 N. Y. 347, 360; *Matter of Smith,* 77 Hun. 134; *Matter of Taylor,* 80 Hun. 589; *Matter of Merriam,* 141 N. Y. 479; *Matter of McCosky's Est.,* 1 N. Y. Supp. 782; *Matter of Trugg's Est.,* 15 Ib. 548; *Matter of James' Est.,* 27 Ib. 288; *Matter of Fayerweather's Est.,* 30 Ib. 273; *Matter of Taylor's Est.,* 30 Ib. 582; *U. S.* v. *Perkins,* 163 U. S. 625-630; *People ex rel.* v. *Western Seaman's Friends Society,* 87 Ill. 246; *State* v. *Bentley,* 75 Vt. 164.

MUNSON, J. No. 46, Acts of 1896, entitled "An act to tax collateral inheritances," exempts from its operation property passing "to or for charitable, educational or religious societies or institutions, the property of which is exempt by law from taxation." This exemption is invoked by institutions incorporated by and located in the States of Massachusetts, New York, Virginia and Illinois. The Tax Commissioner contends that foreign corporations are not within the exemption.

It is a well established general rule that exemptions from taxation are to be strictly construed, and that no claim of exemption can be sustained unless within the express letter or necessary scope of the exempting clause. *Ford* v. *Delta & Pine Land Co.*, 164 U. S. 663; Book 41, Law. ed. 590. The particular exemption in question is found in the statutes of other jurisdictions, and has often received the construction for which the Commissioner contends. *Matter of Prime*, 136 N. Y. 347; *People ex rel.* v. *Western Seaman's Friends Society*, 87 Ill. 246; *Minot* v. *Winthrop*, 162 Mass. 113.

It is argued that the exemption is in recognition of the beneficent purpose of these institutions, and that inasmuch as the purpose is common to them all wherever located, the exemption should be held applicable to all. But we think, with the authorities above cited, that in the absence of any language indicative of a different intent, the Legislature must be deemed to have made the exception for the benefit of its own institutions.

It is suggested that the use of the word "law" instead of "statute" indicates an intention to include corporations outside our jurisdiction; but our statute is the same in this respect as those construed in the New York and Massachusetts cases above cited. It is true, as further suggested, that in the *Mat-*

ter of Prime, which was cited as an authority in *Minot* v. *Winthrop,* there were features peculiar to the New York statute which entered into the consideration of the subject and bore upon the conclusion reached; but we think these cases may nevertheless be relied upon in support of the State's contention. It was said in *Humphreys* v. *State,* 70 O. St. 67, 101 Am. St. 888, upon a review of the New York and other cases, that the exemption clause of their statute would have related only to their own institutions, even if the words "in the State" had been omitted.

But the main contention of the estate is based upon the phraseology of our Constitution, which declares in effect that every member of society is bound to contribute "his proportion" towards the expense of the protection which the State affords him. It is said that this excludes all methods of taxation that are not uniform, equal and proportional, and that the law in question lacks the required qualities.

The case of *Curry* v. *Spencer,* 61 N. H. 624, decided in 1882, supports this position. The New Hampshire constitution provides for the laying of "proportional" taxes, and declares that an inhabitant is bound to contribute only his share. The Court considered that these provisions precluded the imposition of an inheritance tax, whether it was regarded as a tax upon property or upon a civil right or privilege.

It is said in the note to *State* v. *Hamlin,* 86 Me. 495, in 41 Am. St. 569, that *Curry* v. *Spencer* is the only case which holds that a tax on inheritances is unconstitutional because not equal and uniform in its operation. But it is claimed in argument that the cases holding the contrary were decided under constitutions which provide specifically for the imposition of excises, or which make the requirements of equality and uniformity applicable only to taxes imposed on real and personal

property. It is certain, however, that in one of these cases this restriction to property was not found in any express statement, but was arrived at by inference and construction. *Eyre* v. *Jacob,* 14 Gratt. 422.

It was said in the New Hampshire case above cited, in arguing the inapplicability of *Eyre* v. *Jacob,* that the Virginia constitution required that taxes on property should be uniform, and that the decision of that case was put expressly upon the ground that the requirement of uniformity applied to property only. The provision referred to was that all property other than slaves should be taxed in proportion to its value. But this clause was preceded by the general declaration that taxation should be equal and uniform throughout the commonwealth, and the court considered the effect of this provision, and said the inference was strong that property only was in the minds of the framers.

It is clear that the language of our Constitution will not permit this treatment of the question of equality. The provision requiring a proportional contribution cannot be restricted to any particular subject of taxation, for it relates to the entire burden cast upon the taxpayer. It provides that the expenses of government shall be apportioned equally, and not merely that exactions levied upon property shall be equal. The question is, what constitutes equality of apportionment within the meaning of this provision; and in determining this the basis of the tax in question must be considered.

It is now universally conceded that taxes of this character are not taxes upon property, but taxes upon the transmission of property. It is considered that the acquirement of property by descent or by will is not a natural right, but a privilege accorded by the State. It is argued that the power to determine the devolution of estates includes the power to exact just

and proportional contributions as they pass. And it has been said repeatedly in judicial discussions upon this subject that inheritance charges are not precluded by constitutional provisions requiring uniformity and equality of taxation.

We think our constitutional requirement of proportional contributions for the support of the government was not intended to restrict the State to methods of taxation that operate equally upon all its inhabitants, regardless of the variety and measure of the advantages derived from its protection and regulation. A member of the body politic has from the State not only the protection of his property, but the privilege of taking property by descent and by will. It seems clear that privileges of this character, as well as property, are to be considered in determining the just proportion of the individual.

It is suggested further that the law is invalid because of the inequality arising from the exemption of estates not exceeding two thousand dollars in value. The constitutional provision under consideration does not prevent the making of exemptions. *Colton* v. *Montpelier,* 71 Vt. 413, 45 Atl. 1039.

Judgment affirmed; to be certified to the Probate Court.

STATE *v.* CALVIN B. NILES.

May Term, 1905.

Present: ROWELL, C. J., TYLER, MUNSON, START, WATSON, HASELTON, and POWERS, JJ.

Opinion filed January 29, 1906.

Game Laws—Hunting Deer—Resident and Nonresident Hunters—Property in Game—Police Power—Constitutional Law—Class Legislation—No. 128, Acts 1904.

Since No. 128, Acts 1904, providing for granting licenses to nonresident hunters, repeals only such acts and parts of acts as are inconsistent therewith, No. 94, Acts 1896, as amended by No. 108, Acts 1898, regulating the hunting of deer, is still in force and binding both upon residents and nonresidents of this State, except as is otherwise provided by said Act of 1904.

There is nothing in said Act of 1904 which is inconsistent with said Act of 1896, except the provision requiring a nonresident hunter to procure a license, the provision regulating his transporting deer, and the penalty for his killing more than one deer during the open season.

The wild game within this State is the absolute property of no person in particular, but belongs to the people of the State in their sovereign, collective capacity.

Each resident of this State has a qualified property in the wild game therein, namely, the constitutional right to hunt and take the same, subject to such regulations as the State, in the exercise of its police power, may impose for the common benefit of all its people; but a nonresident of this State has no property whatever in such wild game.

This difference between the respective property rights of residents and nonresidents of this State in the wild game therein bears a just relation to, and affords a sufficient basis for, that classification adopted by our game laws which divides hunters into residents and nonresidents; and, therefore, the regulations prescribed by No. 128, Acts 1904, governing nonresidents who hunt deer in this State, which differ, in favor of such nonresidents, from those provisions of No. 94, Acts 1896, as amended by No. 108, Acts 1898, which

regulate hunting by residents, are within the police power of the State, and do not render either act unconstitutional.

A nonresident hunter who has legally obtained a license under No. 128, Acts 1904, and has killed a deer under his license, has such a property in the body of the animal that he may remove it from the State without having it open to view, tagged, and labelled, as required by No. 94, Acts 1896, in the case of a resident hunter.

INFORMATION for being possessed of two wild deer during the closed season for hunting, and taking wild deer in violation of No. 94, Acts 1896, as amended by No. 108, Acts 1898. Heard on demurrer to the information at the March Term, 1905, Franklin County, *Rowell,* J., presiding. Demurrer overruled, *pro forma,* and information adjudged sufficient. The respondent excepted.

Lee S. Tillotson for the respondent.

No. 128, Acts 1904, does not purport to amend any other law. It covers the whole subject of hunting deer in this State by nonresidents, and discriminates in favor of nonresidents. This discrimination renders both No. 128, Acts 1904, and No. 94, Acts 1896, as amended, unconstitutional. *State* v. *Shedroi,* 75 Vt. 277; *State* v. *Hoyt,* 71 Vt. 59; *State* v. *Cadigan,* 73 Vt. 251; *State* v. *Insurance Comrs.,* 33 L. R. A. 288; Am. & Eng. Enc. of Law, 735; Cooley's Const. Lim. (3rd ed.) 186; *Harvey* v. *Com.,* 20 Fed. Rep. 417.

Warren R. Austin, State's Attorney, for the State.

The preservation of fish and game is within the police power of the State. *Lawton* v. *Steele,* 152 U. S. 133; *Canfield* v. *U. S.,* 167 U. S. 518.

The difference in the regulations governing resident and nonresident hunters does not amount to an unconstitutional

discrimination, if such classification is a just one. 165 U. S. 165; *State* v. *Hoyt,* 71 Vt. 59; *State* v. *Cadigan,* 73 Vt. 245.

START, J. The respondent demurs to the information wherein he is charged with the offence of having in his possession two wild deer during the closed season for hunting, and with taking wild deer, contrary to the provisions of No. 94 of the Acts of 1896 as amended by No. 108 of the Acts of 1898, and insists that by No. 128 of the Acts of 1904 nonresidents of this State are exempt from the penalties provided for by the Acts of 1896, and that he is thereby discriminated against in contravention of his rights under the fourteenth amendment to the Constitution of the United States. He claims that, by No. 128 of the Acts of 1904, a resident of this State is unlawfully discriminated against, in that he is by the Act of 1896, as amended by No. 108 of the Acts of 1898, prohibited from killing or having in his possession a deer during the closed season for hunting; that for killing or having in his possession, during the open season more than one deer he subjects himself to a fine of one hundred dollars; that he is prohibited from transporting a deer during the open season without its being open to view, tagged, and plainly labelled with the name of the owner thereof, and accompanied by him; that he is prohibited, during the open season, from hunting, destroying, or capturing deer with a dog or dog kind, by the aid or use of a jack or artificial light, by the method known as crusting, while the deer are yarded, or by the use or assistance of any snare, trap, or salt-lick; and that the possession of a deer, except in the open season, is presumptive evidence that he is guilty of a violation of the provisions of section one of the Act of 1896, while a nonresident is, by No. 128 of the Acts of 1904, exempt from all of these prohibitions and requirements. These claims, as a whole, are not sound.

Section one of the Act of 1896 provides that no person, except in the open season, shall pursue, take, or kill a wild deer, or have in his possession a wild deer or part thereof, so taken or killed, and that the possession of a deer or any part thereof, except in the open season, shall be presumptive evidence that the person having it in his possession is guilty of a violation of the provisions of the section. The Act of 1904 repeals only such acts and parts of acts as are inconsistent therewith. The Act of 1896, as amended by the Act of 1898, is still in force and binding upon a nonresident as well as a resident of this State, except as is otherwise provided by the Act of 1904.

There is nothing in the Act of 1904 that is inconsistent with the Act of 1896, except the provisions relating to the transporting of deer, the penalty for killing more than one deer, and the provision requiring a nonresident to procure a license. That part of the Act of 1896, as amended by the Act of 1898, which prohibits the killing or possession of a deer during the closed season for hunting, or, at any time, the hunting of deer with a dog or dog kind, by the aid or use of a jack or artificial light, by methods known as crusting, while deer are yarded, or by the use or assistance of any snare, trap, or salt-lick, remains in force; and for a violation of any of these provisions residents and nonresidents are alike punishable under the Act of 1896.

A nonresident's license to hunt in this State, except as is otherwise provided by the Act of 1904, must be taken to be a license to do so in conformity to the general game laws of this State; and a nonresident who has in his possession, during the closed season, a deer, subjects himself to the penalty provided by the Act of 1896. A nonresident being punishable, under the Act of 1896, for having a deer in his possession during the

closed season, is not exempt from the presumption, therein provided for, which arises from such possession; and in prosecutions against him under the Act of 1896 for having such possession, he must overcome this presumption to the same extent that a resident is required to in a like case.

The Act of 1904 does not impose the same penalty upon a nonresident for killing more than one deer during the open season that is by the Act of 1896 imposed upon a resident for doing the same act; for that, a nonresident may be fined not less than twenty-five nor more than one hundred dollars, while a resident must pay a fine of one hundred dollars. Also, a nonresident may transport the carcass of one deer by having a coupon, furnished by the Fish and Game Commissioners, attached thereto, while a resident to do so must have the carcass open to view, tagged, and plainly labelled with the name of the owner thereof, and accompanied by him. These regulations for admitting nonresidents, on payment of a license fee, to this State for the purpose of hunting, which differ from those regulating hunting by residents of this State, who are not required to procure a license, are within the police power of the State, and do not render either act non-enforceable.

A resident is not by the acts denied his constitutional right to hunt deer under legislative regulations as to the time for doing so and the number of deer that may be killed by one person; and we can not say that these regulations are oppressive or unreasonable. These regulations apply to a nonresident as well as a resident hunter. There is nothing in the Act of 1904, which provides for licensing of a nonresident hunter, that takes away the right of a resident to hunt. The regulations respecting the licensing of a nonresident hunter, which differ from those provided for a resident, relate to the license fee, the punishment, and the transportation of deer. If these

discriminate against a resident, they are discriminations which are within the police power of the Legislature to make.*

No person can acquire an absolute property in animals *ferae naturae*. The ownership in such animals is at most a qualified one. They belong to no persons in particular. As Blackstone says, 2 Com. 394: "A man may, lastly, have a qualified property in animals *ferae naturae* * * *; that is he may have the privilege of hunting, taking, and killing them, in exclusion of other persons. Here he has a transient property in these animals, usually called game, so long as they continue within his liberty; and may restrain any stranger from taking them therein; but the instant they depart into any other liberty, this qualified property ceases." It follows that this qualified property belongs to all the people of the State in common, and, as Blackstone further says * * *, "that this natural right, * * * may be restrained by positive laws enacted for reasons of state or for the supposed benefit of the community."

Mr. Justice White, in *Geer* v. *State of Connecticut,* 161 U. S. 519, Law. ed., Book 40, 793, remarks that: "The right to preserve game flows from the undoubted existence in the state of a police power to that end; that in most of the states laws have been passed for the protection and preservation of game, and that the power of the state to so legislate has not been questioned." He further says, * * * "that the power or control lodged in the state, resulting from this common ownership, is to be exercised like all other powers of government as a trust for the benefit of the people, and not as a prerogative for the advantage of the government as distinct from the people, or for the benefit of private individuals as distinguished from the public good." He quotes from *Ex parte Maier,* 103 Cal. 476, where it is held that the wild game within a state belongs to the people in their collective sovereign capacity. In

State v. *Rodman,* 58 Minn. 393, the Court said in respect to the ownership of wild animals, that such ownership is in the state, not as proprietor, but in its sovereign capacity, as the representative and for the benefit of all its people in common. This is the doctrine of *American Express Co.* v. *People,* 133 Ill. 469, 23 Am. St. R. 641, where it is held that the ownership of game is in the people of the state and that the power to legislate on this subject is part of the police power inherent in each state. See *Phelps* v. *Racey,* 60 N. Y. 10, 19 Am. R. 140; *Wheatley* v. *Harris,* 70 Am. Dec. 259.

The law upon this subject is concisely stated in *Magner* v. *People,* 97 Ill. 333: "The ownership being in the people of the state,—the repository of the sovereign authority,—and no individual having any property rights to be affected, it necessarily results that the legislature, as the representative of the people of the state, may withhold or grant to individuals the right to hunt and kill game, or qualify and restrict it, as, in the opinion of its members, will best subserve the public welfare." This doctrine is fully stated in *Payne* v. *Sheets,* 75 Vt. 335, 55 Atl. 656.

In *State* v. *Norton,* 45 Vt. 258, the Court said: "The numerous statutes which have been passed for the protection of game and fish have been deemed necessary to the beneficial enjoyment of the constitutional right, and the Court will not hold such laws unconstitutional until it is clearly shown that they are so prohibitory as to virtually deprive the inhabitants of the right secured to them by the constitution." In *State* v. *Theriault,* 70 Vt. 617, 41 Atl. 1030, a statute which authorized the Fish and Game Commissioners, when they placed fish in a pond or stream, to prohibit fishing therein, or in specified portions thereof, for a term of years, and provided that waters when so stocked should be treated as public waters, etc., was

held not unconstitutional, but as a reasonable exercise of the police power of the state.

The granting of licenses by the Fish and Game Commissioners to nonresident hunters to kill deer within this State is within the proper exercise of the police power of the State, provided it does not discriminate in their favor and against resident hunters, without classification. Classification is essential to discrimination, and there can be no classification unless there is some difference between resident and nonresident hunters that bears a just relation to the classification. In this case a difference is found in the fact that the resident hunter has a qualified property in the deer, while the nonresident has no property whatever therein.

There is a clear discrimination in the law, as has been shown, in favor of nonresidents in respect to having the carcass exposed to view, labelling, etc. But we think that a nonresident person, having paid for and obtained a license and having killed a deer under his license, acquires such a property in the body of the animal that it may be removed from the State without its being open to view, tagged, labelled, etc. In this respect the act is not unconstitutional.

Judgment affirmed and cause remanded.

[NOTE.—Judge Start finished his work upon this opinion on the Saturday before his death, which occurred Tuesday, Nov. 7, 1905. From the star the opinion is *Per Curiam*.—REPORTER.]

EUGENE S. ABBOTT AND ELLA M. ABBOTT v. RUSSELL A. FLINT'S ADMINISTRATOR.

January Term, 1906.

Present: ROWELL, C. J., TYLER, MUNSON, WATSON, and POWERS, JJ.

Opinion filed January 31, 1906.

Reformation of Instruments—Description in Deed—Mistake of Fact.

Equity will not correct a claimed mistake in a written instrument, without clear and undoubted proof that such mistake has been made.

Although the description in a deed is worded exactly as the parties intended, yet if, through ignorance, inadvertence, negligence or otherwise, it actually does not describe all the land which the parties intended it should, and which they supposed it did describe, this is a mistake of fact, and a court of equity will reform the instrument.

The rule is different where there is a misunderstanding as to anything material contained in the deed. In that case the requisite mutuality of assent as to such thing is wanting, consequently the supposed contract does not exist.

Defendant, as administrator, sold by auction to the orator certain land belonging to decedent's estate and known as the "Bigelow Farm," which comprised, as all the parties supposed, all the land that the decedent owned in that part of the town at the time of his death. In the deed from the defendant the land was described by referring to certain other deeds, which description did not include certain adjacent "gore-land" which the decedent owned at the time of his death, and which he had used, occupied, and treated as a part of said farm, and between which and the rest of the farm there was no definite boundary. The defendant intended to convey all the land that belonged to the decedent's estate situate in that part of the town, and he did not know of the gore-land as a separate entity. The orators knew of its existence and supposed it was conveyed to the oratrix by the defendant's deed. *Held*, that a court of equity would reform said deed so that the description should include said gore-land.

APPEAL IN CHANCERY. Heard on bill, answer, and master's report at the December Term, 1904, Orange County, *Haselton,* Chancellor. Decree that the deed from the defendant to the oratrix be reformed so as to convey the "gore-land." The defendant appealed. The opinion states the case.

N. L. Boyden for the orators.

March M. Wilson, and *Frank Plumley* for the defendant.

In order that the deed may be reformed on the ground of mistake, such mistake must have been mutual, and the minds of the parties must have met on some agreement. 24 Am. & Eng. Enc., 649, 650; *Page* v. *Higgins,* 5 L. R. A. 152; *Coles et al.* v. *Bowne,* 10 Paige 525, 4 L. ed. 1076; *Cathcart* v. *Robinson,* 30 U. S. 263; *First National Bank, etc.* v. *S. Frank Hall,* 101 U. S. 43; *Baldwin* v. *Mildeberger,* 2 Hall 176; *Utley* v. *Donaldson,* 94 U. S. 29; *Hazard* v. *Ins. Co.,* 1 Sumn. 218; *Bryce* v. *Lorillard F. Ins. Co.,* 55 N. Y. 243.

Specific performance should never be decreed unless the terms of the agreement sought to be enforced are clearly proved. *Hennesy* v. *Woolworth,* 128 U. S. 438; *Nickerson* v. *Nickerson,* 127 U. S. 608; *Dalzell* v. *Dueber Watch Case Mfg. Co.,* 149 U. S. 315.

TYLER, J. The master finds that Russell A. Flint died seized of certain real estate situated in Braintree, and, among other parcels, a certain ten acre lot of gore-land, in the northwest corner of the town, between lot No. 52 in the second division and the west line of the town. The title to this gore-land is the subject-matter in dispute.

H. W. Fitts, as administrator of Flint's estate, in October, 1893, sold by auction to the orator, Eugene S. Abbott, the

"Bigelow Farm," which comprised, as all the parties supposed, all the land that Flint had owned in the north-west corner of that town at the time of his decease. Adjacent to this farm and lying between it and the west corner of the town is the gore-land, between which and the farm there are no definite bounds. The deed was made to the oratrix, Ella M., by the direction of her husband, the farm being described by reference to deeds from certain persons to Flint.

The administrator intended to convey all the land that belonged to Flint's estate situated in that part of the town, though he had no knowledge of the gore-land as a separate entity. The orator, Eugene S., knew of its existence and both orators supposed it was conveyed to them by the administrator's deed. The orators occupied this land with said farm several years after the purchase, and they and the administrator for many years supposed it was theirs, when the discovery was made that it was not included in the description in the deed.

The facts that Flint, after his purchase of the land in controversy, maintained no boundary between it and the Bigelow farm, that he made it a part of that farm, occupied and used it as such, and had it set in his grand-list as a part thereof, show clearly that its identity as a separate piece of land had been lost long before the administrator's deed was given to the oratrix. The only shortage in the deed was that it described the land conveyed as acquired from certain persons, when the ten acre piece was in fact acquired from a different person. The administrator had no intention to except it from the conveyance. He did not know of its separate existence, but he meant to convey all the land in that corner of the town that Flint had owned at the time of his death. Eugene S. knew about the gore-land, but supposed it had ceased to have a distinct exist-

ence from the "Bigelow Farm," and that it then was a part of it. His wife supposed she was purchasing all the land that Flint had owned in that locality. This piece was required to make up the 318 acres that the Bigelow farm was said to contain.

A Court of Chancery will correct mistakes in conveyances, when clearly and unequivocally proved, and make the instrument such, both in form and effect, as will fulfill the intention of the parties. This rule is laid down in all elementary works and is recognized in *Beardsley* v. *Knight,* 10 Vt. 185, which is cited with approval in 33 Am. Dec. 193, where *Kennard* v. *George,* 44 N. H. 446, and many other cases are referred to in the notes.

The rule is aptly stated in 24 Am. & Eng. Ency., in the notes upon p. 650, that when through ignorance, inadvertence, negligence, or otherwise, the description in a deed does not in fact embrace the land which the parties intended it should, and which they supposed it did, it is considered a mistake of fact, and the description can be reformed, though it is exactly as the parties intended it should be. See *Goode* v. *Riley,* 153 Mass. 585, and other cases there cited.

This rule is also fully explained and illustrated both in the opinion and in the notes in *Coles* v. *Bowne,* 10 Paige's Ch. 1077, 4 Law. ed. p. 526; Pom. Eq. Jur. §§ 852-855.

It is the rule, as the defendant contends, that equity will not correct a mistake in a written instrument, except on clear and undoubted testimony. *Lyman* v. *Little,* 15 Vt. 576. It is generally said in the books that the court must be satisfied beyond a reasonable doubt that a mistake has been committed, and in the present case the master's report makes it clear that both parties intended a conveyance of all the land in a certain

locality, but by a mutual mistake, they omitted to describe it specifically in the deed, which brings the case within the rule.

The rule is different where there is a misunderstanding as to anything material contained in a deed, for there mutuality of consent is wanting. As was said by Mr. Justice Swayne in *First National Bank* v. *Hall,* 101 U. S. 43, 25 Law. ed. 825, the requisite mutuality of assent as to such thing is wanting; consequently the supposed contract does not exist, and neither party is bound. In the view of the law in such a case, there has been only a negotiation, resulting in a failure to agree. What has occurred is as if it were not, and the rights of the parties are to be determined accordingly. Further on he says: "It is essential to the validity of a contract that the parties should have consented to the same subject-matter in the same sense. They must have contracted *ad idem.*" This rule applied to the case at bar entitles the orators to relief, for the parties did consent to the same subject-matter and in the same sense. There was perfect mutuality of assent in respect to the land, the title to which was to pass to the orators by the administrator's deed, but by a mutual mistake a description of the gore-land was omitted.

No exception was taken to the master's report, and no question is before us but that the master made his findings with the requisite degree of certainty.

Decree affirmed and cause remanded.

ROSE BELHEUMER v. HARRY R. THOMAS.

January Term, 1906.

Present: ROWELL, C. J., TYLER, MUNSON, WATSON, and POWERS, JJ.

Opinion filed January 31, 1906.

Bastardy—Settlement—Fraud—Defendant's Release Secured Through Fraud of Plaintiff's Attorney.

Where through the fraudulent act of a third person, one of two innocent parties must suffer, he who has clothed such third person with the means of perpetrating the fraud, must bear the loss.

The attorney for the plaintiff in two bastardy proceedings had no authority to settle the suits, but he fraudulently induced the plaintiff to sign a sealed instrument releasing the cause of action in each case and discharging the defendant, and thereafter settled with the defendant, who in good faith gave him $50 in settlement of said suits and for said release, which sum said attorney retained, the plaintiff receiving no part of it. Subsequently, and after notice of said fraud, the defendant pleaded the release in bar. *Held*, that the plaintiff who, by trusting her said attorney, enabled him to perpetrate the fraud, must bear the loss, and that said plea in bar was good.

COMPLAINT FOR BASTARDY. Pleas, the general issue, and release under seal. Heard at the September Term, 1905, Chittenden County, *Haselton,* J., presiding, upon an agreed statement as to the sufficiency of said release. The court ruled that said release is not a bar to the action. To this ruling the defendant excepted. Cause passed to the Supreme Court before hearing on its merits. The opinion states the substance of the agreed statement.

Brown & Hopkins, and *V. A. Bullard* for defendant.

The defendant was not a party to the fraud, and the release cannot be avoided as against him. Am. & Eng. Enc.,

154; *Schultz* v. *McLean,* (Cal. 1890); 25 Pac. Rep. 427; *Ratteree* v. *Conley,* 74 Ga. 153; *Campbell* v. *Murray,* 62 Ga. 86; *Booth* v. *Storrs,* 75 Ill. 438; *Marston* v. *Brittenham,* 76 Ill. 611; *Harding* v. *Com. Loan Co.,* 84 Ill. 251; *Compton* v. *Bunker Hill Bank,* 96 Ill. 301; *Whitesides* v. *Taylor,* 105 Ill. 496; *Jones* v. *Smith,* 94 Ind. 516; *Belau* v. *Bryan,* 89 Iowa 348; *Roach* v. *Karr,* 18 Kan. 529; *Somes* v. *Brewer,* 2 Pick. 184; *Root* v. *Bancroft,* 8 Gray 619; *White* v. *Graves,* 107 Mass. 325; *Hiller* v. *Ellis,* 72 Miss. 701; *State* v. *Hewitt,* 72 Mo. 603; *Allen* v. *Aldrich,* 29 N. H. 63; *Kinney* v. *Emery,* 38 N. J. Eq. 101; *Kingsland* v. *Pryor,* 33 Ohio St. 19; *Dorman* v. *Weakly,* 39 S. W. Rep. 890; *Pool* v. *Chase,* 46 Tex. 207; *Gordon* v. *Jeffrey,* 2 Leigh 410.

John J. Enright, and *Edmund C. Mower* for the plaintiff.

Plaintiff's attorney had no authority to settle, therefore whatever he did by way of settlement is not binding on plaintiff. *Penniman* v. *Patchin,* 5 Vt. 346; *Carter* v. *Talcott et al.,* 10 Vt. 471; *Vail* v. *Conant, Admr.,* 15 Vt. 314; A. & E., 2nd Ed. Vol. 3, p. 358; *Isaacs* v. *Zugsmith,* 103 Pa. St. 77.

TYLER, J. This is a complaint for bastardy. The defendant pleaded the general issue and the plaintiff's release of the cause of action. The case was heard below upon an agreed statement of facts, which is in substance, that the plaintiff, on March 16, 1904, brought a complaint before a justice of the peace, through one Grossman, who acted as her attorney; that on the same day she brought another suit of the same kind, upon a similar but distinct cause of action, against the defendant, which suit is pending in county court; that this suit was entered July 8, 1904.

The release, signed, sealed, and sworn to by the plaintiff and witnessed, reads:

"Received of H. R. Thomas satisfaction in full of all claims and demands of every kind and nature that I have or can have against him to this date, meaning hereby especially to discharge the two proceedings brought against him by me before F. G. Webster, Justice of the Peace, on the 16th day of March, 1904, and to discharge all claims that I have or can have against said Thomas in respect of the matters complained of in said proceedings."

It was agreed that the plaintiff never gave her attorney authority to settle either of said cases, unless this release was authority, and that he obtained her signature by false representations and fraud; that he pretended to read the contents of the paper to her before she signed it, and represented that it was drawn for the purpose of bringing another suit against the defendant.

It was agreed that the plaintiff, who was nineteen years of age, had no knowledge of legal matters, and that she relied entirely upon the representations of Grossman in executing the paper.

The defendant, on March 26, 1904, paid Grossman fifty dollars for the paper, which sum the latter retained, the plaintiff receiving no part of it; and she did not learn until April 22, 1904, that a release had been given to the defendant and that he had paid money to Grossman for it. Immediately upon learning these facts she notified the defendant's attorney, through another attorney whom she had employed, that the release had been obtained from her by fraud, that she had given Grossman no authority to settle the cases, and that she repudiated the pretended settlement.

The defendant and his attorneys had no knowledge that the plaintiff had been deceived by Grossman, and he paid the sum of fifty dollars in good faith in settlement of the two suits.

It is a manifest hardship to the plaintiff that she has been defrauded of her right of action, if she had one; and it would be a hardship to the defendant if he were compelled to make a defence to the suit, having paid fifty dollars for a release of the cause of action. One of these parties must suffer loss in consequence of the fraudulent act of Grossman. Which shall it be? It appears that the defendant acted in good faith in paying for and taking the release. The paper was shown to him with the plaintiff's signature attached, and it was witnessed and sworn to. He accepted and paid for it and was innocent of any wrong in that transaction. The plaintiff was innocent of any wrong doing in signing the release and allowing Grossman to depart with it. It was not necessary that the case should show that she was negligent or careless in signing the paper and intrusting it to Grossman without knowing its contents. It was sufficient that by her act she made it possible for Grossman to accomplish what he did, to make herself amenable to the rule that, where through the fraudulent act of a third person, one of two innocent parties must suffer, he, who has clothed such third person with the means of perpetrating the fraud, must bear the loss.

The case is in principle like *Passumpsic Bank* v. *Goss and Page,* 31 Vt. 315; where Page signed a note with Goss, as his surety, payable to the Bank, under an agreement with Goss that the latter should not use the note unless he obtained another surety upon it; but in violation of the agreement Goss procured the note to be discounted. It was held that this agreement constituted no defence, the bank officers having no knowledge of it. In both cases the instruments were apparently perfected when they were presented, and there was nothing upon them to indicate that they were not ready for delivery.

The case is different from *Goodman* v. *Eastman*, 4 N. H. 455, where two men signed a note for $20, payable to a third person, and the signer, who was intrusted with it, raised it to $120. There the Court said that the alteration was in effect a forgery. In that case the alteration was made after the note passed from the hands of the defendant and when he could not have prevented it. See *National Bank* v. *Baltimore, etc. R. R.*, 105 Am. St. R. at page 331.

Judgment reversed, and judgment for defendant.

J. F. COLSTON *v.* W. W. BEAN.

January Term, 1906.

Present: ROWELL, C. J., TYLER, MUNSON, HASELTON, and POWERS, JJ.

Opinion filed January 31, 1906.

Sales—Fraud—Burden of Proof—Instructions.

The obligation of proving a fact rests upon the party who substantially asserts the affirmative of the issue.

The "burden of proof," in the sense of the duty of producing evidence, may pass from one party to the other as a case progresses; but the "burden of proof," meaning the obligation to establish the truth of the claim upon which the plaintiff rests his case, is upon him throughout.

In an action on the case for the alleged fraud of selling to plaintiff certain wagons as free from incumbrance, which in fact were covered by a mortgage, although the defence was that defendant sold the wagons with the mortgagee's permission, and that plaintiff bought them with knowledge of the mortgage, it was proper to instruct the jury that, as plaintiff had alleged fraud in the sale, the burden was upon him to prove it by a preponderance of the evidence.

CASE for deceit. Plea, the general issue. Trial by jury at the December Term, 1904, Windsor County, *Watson*, J., presiding. Verdict and judgment for the defendant. The plaintiff excepted.

Joseph C. Enright, and *Edward R. Buck* for the plaintiff.

The burden was on the defendant to prove that he had the permission of the mortgagee to sell the wagons. "He who affirms must prove." *Patee* v. *Pelton*, 48 Vt. 182; *Simonton* v. *Winter*, 5 Pet. 141; 1 Rice Ev. 111, 112; *Tucker* v. *Maryland*, 46 L. R. A. 181; *Frost* v. *Berkeley etc., Co.*, 26 L. R. A. 694; *Hay* v. *Peterson*, 34 L. R. A. 581.

J. D. Denison for the defendant.

The only plea was the general issue. He who alleges fraud must prove it. *White* v. *Trotter*, 53 Am. Dec. 112; *Bartlett* v. *Blake*, 58 Am. Dec. 775; *Johnson* v. *McGrew*, 77 Am. Dec. 137; *Nichols* v. *Patten*, 36 Am. Dec. 713; *Davis* v. *Calvert*, 25 Am. Dec. 282.

TYLER, J. Action, case for the defendant's alleged fraud in a sale to the plaintiff of certain wagons as free from incumbrance, when they were incumbered by a mortgage to W. H. Dubois; defence, that by an agreement with Dubois the defendant had a right to sell the wagons, also, that the plaintiff bought them with knowledge of the mortgage.

The court instructed the jury that, as the plaintiff had alleged fraud in the sale, the burden was upon him to prove it by a preponderance of the evidence. The plaintiff contends that this was error; that, as the defendant had attempted to justify the sale upon the ground of the mortgagee's permission, the burden was upon him to prove such permission.

When the defendant had introduced evidence tending to prove the fact of permission, the burden was upon the plaintiff to overcome this evidence by a greater weight of his evidence in order to establish his claim of fraud.

The record of the trial is not before us, but presumably the plaintiff proved the allegations in his declaration, and, resting there, was entitled to a verdict. The defendant did not set up an affirmative defence, but sought to relieve the case of the element of fraud claimed by the plaintiff to exist.

Fraud is not presumed, but must be proved; therefore the plaintiff was bound to maintain the affirmative of the issue tendered in his declaration. It is the rule that the obligation of proving a fact rests upon the party who substantially asserts the affirmative of the issue. 1 Greenl. Ev. § 74; *Bosworth* v. *Bancroft*, 74 Vt. 451.

The burden of proof, in the sense of the duty of producing evidence, may pass from one party to the other as a case progresses, while the burden of proof, meaning the obligation to establish the truth of the claim upon which the plaintiff's case rests, is upon him throughout the trial. See Thayer's Treatise on Ev. ch. 9; 1 Greenl. Ev. ch. 3; 5 Am. & Eng. Ency. 22.

Judgment affirmed.

STATE *v.* HARRY PAIGE.

May Term, 1905.

Present: ROWELL, C. J., TYLER, MUNSON, START, WATSON, HASELTON, and POWERS, JJ.

Opinion filed February 1, 1906.

Intoxicating Liquor—Illegal Sales—Criminal Pleading—Negativing Exception—Kind of Liquor—How Exposed—Constitutional Law—Statutes—Unconstitutional in Part—No. 90, Acts of 1902.

It is only when the exception in a penal statute is so incorporated with the enactment as to constitute a material part of the definition or description of the offence that it need be negatived in the information; otherwise it is matter of defence merely.

An information for keeping and exposing intoxicating liquor for sale in violation of No. 90, Acts 1902, need not exclude by averment the exception in § 21, that said act shall not apply to certain sales of cider and of native wines, nor to the furnishing of liquor in one's dwelling house, unless in the circumstances specified.

An information for keeping and exposing intoxicating liquor for sale in violation of No. 90, Acts 1902, need not specify the kind of liquor relied upon, nor aver how it was so kept and exposed.

An unconstitutional provision in a statute will vitiate the whole act only when the invalid provision is so interwoven with the other provisions of the enactment as to constitute such an essential element of its scheme that without it the act would be incomplete, and inadequate to accomplish legislative intent.

The respondent demurred to an information charging him with keeping and exposing intoxicating liquor for sale in violation of No. 90, Acts 1902. *Held*, that if the search and seizure clauses of said act are unconstitutional, they are not so related to the enactment as to render it wholly void; and that, therefore, the respondent cannot raise that question, as he could gain nothing thereby.

INFORMATION for keeping and exposing intoxicating liquor for sale in violation of No. 90, Acts 1902. Heard on

demurrer to the information at the December Term, 1904, Caledonia County, *Tyler*, J., presiding. Demurrer overruled, *pro forma*, and information adjudged sufficient. The respondent excepted.

M. M. Gordon, and *J. P. Lamson* for the respondent.

No. 90, Acts 1902, is unconstitutional in that it does not provide for a hearing upon the seizure of liquors alleged to have been exposed for sale. 8 Cyc. 1097, § 3; *Cotter* v. *Doty*, 5 Ohio 394; *Terrett* v. *Taylor*, 9 Cranch (U. S.) 43.

Any proceeding under an act, a part of which is unconstitutional is void. *Mason* v. *Messenger et al.*, 17 Iowa 261; *Taylor* v. *Porter*, 4 Hill 146; *Dartmouth College* v. *Woodward*, 4 Wheat. 518.

Frank D. Thompson, State's Attorney, and *David E. Porter* for the State.

The allegation that the respondent "did expose for sale intoxicating liquor" follows the words of the statute and sufficiently describes the offence. Nor is it necessary to specify the kind of liquor. *State* v. *Clark*, 44 Vt. 636; *State* v. *Cook*, 38 Vt. 437; *State* v. *Jones*, 33 Vt. 443; *State* v. *Hodgson*, 66 Vt. 134; *State* v. *Reynolds*, 47 Vt. 297.

It is not necessary to negative the exception in § 21. This is matter of defence merely. *Com. v. Hart*, 11 Cush. 130; *State* v. *Abbey*, 29 Vt. 60; *State* v. *Butler*, 17 Vt. 145; *State* v. *Barker*, 18 Vt. 195; *State* v. *Norton*, 45 Vt. 258; *State* v. *Freeman*, 27 Vt. 523.

POWERS, J. An information in two counts for keeping and exposing intoxicating liquor for sale contrary to the provisions of No. 90, Acts of 1902. A demurrer thereto assign-

ing ten causes, of which only those hereinafter considered are relied upon in the respondent's brief.

The first clause of section 21 of the Act of 1902, prohibits the exposing or keeping for sale intoxicating liquor except as authorized in the act. The second clause of the same section provides that the act shall not apply to certain sales of cider and native wines, or to the furnishing liquor in one's own dwelling house unless in the circumstances specified. The respondent claims that the information is fatally defective in that it does not show by proper averment that the liquor referred to therein was not of the kinds specified in the second clause of the section to which the prohibition does not apply. Such averment was unnecessary. It is only when the exception in a penal statute is so incorporated with the enactment as to constitute a material part of the definition or description of the offence, that it need be negatived in the information; otherwise it is matter of defence merely.

To illustrate: In an indictment under a peddler's license act which excepted from its operation goods manufactured in this State, it was held in *State* v. *Hodgdon,* 41 Vt. 139, that it was not necessary to aver that the goods peddled were not manufactured in this State.

Under a statute prohibiting the killing of deer, the third section of which provided that it should not apply to deer partially or wholly domesticated, it was held in *State* v. *Norton,* 45 Vt. 258, that it was unnecessary to aver that the deer referred to was not domesticated.

In a prosecution for bigamy under a statute, one section of which provided that it should not apply to certain persons therein specified, it was held unnecessary, in *State* v. *Abbey,* 29 Vt. 60, to negative the exception by averment.

In a prosecution under V. S. 711, which requires children between certain ages to be sent to the public schools unless they belong to the classes therein specified, it was held in *State* v. *McCaffrey,* 69 Vt. 85, to be unnecessary to negative the exceptions in the statute.

The same result was reached in *State* v. *Bevins,* 70 Vt. 574, where the question is sufficiently discussed.

If further authorities were required, reference might be had to *Becker* v. *State,* 8 Ohio St. 391; *Com.* v. *Hart,* 11 Cush. 130 and *Com.* v. *Gagner,* (Mass.) 10 L. R. A. 442 wherein this very question was decided.

The respondent insists that the information should show how, where and what kinds of liquors were kept or exposed for sale.

It was not necessary to show how it was kept or exposed, for the statute which creates the offence fully defines it in clear and unmistakable terms; and the charge here is in the terms of the statute; nothing more is required. *State* v. *Jones,* 33 Vt. 443; *State* v. *Cook,* 38 Vt. 437; *State* v. *Hodgson,* 66 Vt. at p. 150.

The information does show where the liquor was kept and exposed, at Hardwick in the County of Caledonia. This averment is sufficient. *State* v. *Suiter,* 78 Vt. 391.

It was unnecessary to specify the kinds of liquor kept or exposed. *State* v. *Reynolds,* 47 Vt. 297.

The respondent attacks the constitutionality of the act on the ground that the search and seizure clauses thereof in no-wise provide for a notice and hearing before forfeiture, and so deprive a person of his property without due process. But the respondent not being affected by the search and seizure clauses is not in a position to challenge their constitutionality, *State* v. *Scampini,* 77 Vt. 92, unless those clauses are of such

a character that their invalidity would vitiate the whole act. For, as was recently pointed out in the Scampini Case and again in *State* v. *Abraham,* 78 Vt. 53, it is only when the invalid provision is so interwoven with the other provisions of the enactment as to constitute an essential element of its scheme, and is one without which the act would be incomplete and unenforceable according to the legislative intent, that it vitiates the whole. These clauses are not of that character, and can be rejected without marring the legal symmetry of what remains. This was so held in *State* v. *Potter,* 3 R. I. 64. So we decline to pass upon the constitutionality of the provisions complained of, since the respondent could gain nothing thereby, and hence, is not in a position to raise the question.

Judgment affirmed and cause remanded.

PERCIVAL W. CLEMENT *v.* HORACE F. GRAHAM, STATE AUDITOR.

May Term, 1905.

Present: ROWELL, C. J., TYLER, MUNSON, START, WATSON, HASELTON, and POWERS, JJ.

Opinion filed February 2, 1906.

Mandamus to Public Officers—Private Relator—Pleadings in Mandamus—Complaint—Sufficiency—Motion to Dismiss—Motion to Quash—Judicial Notice—Answer—Function of —Averment on Information and Belief—English Statutes

How Far Part of Our Common Law—Auditor of Accounts —Public Records—Citizen's Right to Inspect—Ministerial Duty.

The statute of 1782, adopting the common law of England, was largely declaratory of the common law as here practiced and understood, and should be construed as including within the common law adopted such English statutes as were passed before October 1, 1760, for the alteration and explanation of the common law, and which were not repugnant to the Constitution or some Act of the Legislature, and were applicable to the circumstances of this State. The various subsequent changes in the wording of our statute were not intended to work a change in the law itself.

The statute of 9 Anne, Ch. 20, respecting pleadings and proceedings in actions of mandamus, is a part of the common law so adopted.

By No. 74, Acts of 1876—V. S. 1617, 1620—the provisions of the statute of Anne were, in effect, extended to all cases of mandamus.

A mandamus proceeding is an action at law and, under our practice, the complaint takes the place of the alternative writ, the answer takes the place of the return, and subsequent pleadings may be had till issue is joined on the merits.

The pleadings are to be governed by the rules of the common law, and must, as to substance, meet the requirements of good pleading in an ordinary action at law.

Under the rule of pleading that each party tacitly admits all material facts adversely alleged which he does not specifically deny, all material allegations in the complaint which the answer denies only on information and belief, and all material allegations which the answer neither expressly admits nor denies, but calls upon the relator for his proof, are admitted to be true.

But allegations which are only conclusions of law from the facts stated, and not traversable, are not thus admitted.

A motion to dismiss does not reach defects in the complaint which pertain only to the right of recovery on the merits. If the complaint is defective in substance, advantage thereof may be taken by motion to quash at any time before the peremptory writ is awarded.

In mandamus proceedings where no traverse is filed to the answer, the matters in controversy are usually determined on the complaint and answer. But in this case, though no traverse was filed, testimony was taken, filed, and used at the hearing by both parties with-

out objection. They thereby treated the case as if a traverse had been filed, and the Court does the same.

Courts are bound to take notice of all common law rights and duties and of all general customs, hence they ought not to be stated in pleading.

A complaint for a mandamus to the Auditor of Accounts commanding him to exhibit to the relator vouchers on file in his office, alleged in positive terms the official character of the defendant and that it is his statutory duty to exact such vouchers and to keep them on file in his office. *Held*, that if, as stated in the complaint, it is the duty of the Auditor to exhibit such vouchers to citizens and tax-payers, the complaint sufficiently states the origin of that duty; for, if such duty exists, it arises at common law and the Court takes judicial notice thereof.

It need not be stated in the complaint that there were any such vouchers in the Auditor's office or in his possession at the time of the demand for an inspection and the refusal, nor what they were, nor that it was within the power of the Auditor to comply with the demand; for the Court takes judicial notice of the statutory duty of the Auditor to exact such vouchers, and to keep them on file, and of their general nature, and the law presumes that public officers have performed their statutory duty.

If such vouchers are public records, they are so as matter of law, and therefore, that fact need not be averred in the complaint.

In a complaint for mandamus it is sufficient to describe with reasonable certainty the thing to be done; especially is this true in the case of a public officer who is commanded to perform a public duty, and the facts constituting the act are within his personal knowledge.

That which already sufficiently appears in the pleading of either party without formal allegation, need not be expressly averred.

The averment on information and belief that the relator has no other adequate remedy is insufficient; but the defect is cured when it is apparent from the other averments in the complaint that such is the fact.

In V. S. 305, the word "bill" includes all claims and accounts which by law may be presented to the Auditor for allowance, and the word "vouchers" includes all books, papers, receipts, receipted bills, and documents which serve to prove the truth of the claims and accounts so presented.

Vouchers used, filed, and kept as required by V. S. 305 are public documents.

At common law, all persons who have the requisite interest in the subject-matter thereof have the right to inspect public records and public documents, when such inspection is not detrimental to the public interests. And the existence of this right regarding the vouchers, files, papers, and records in the office of the Auditor of Accounts is impliedly recognized by No. 24, Acts of 1904.

Whether the injunctions of the law regarding the allowance of claims and the drawing of orders by the Auditor have been and are followed is a question involving public rights in which all citizens and taxpayers are alike interested. If by negligence or misconduct bills have been or are being allowed contrary to law, public policy demands that such evils be remedied and that proper facilities be afforded to bring about this result.

For this purpose, under reasonable rules and regulations, the citizens and taxpayers of this State have the right to inspect the public records and public documents kept in the office of the Auditor of Accounts; and the Auditor owes to the public the correlative duty to accord that right.

This duty of the Auditor to accord to taxpayers such right of inspection, when in contemplation of law an occasion arises for its exercise, is ministerial in its nature.

The refusal by the Auditor of Accounts to accord this right in circumstances where the law requires it, is a detriment to the public interests, and relief will be granted by awarding a mandamus.

Although the office of the Auditor of Accounts is a branch of the Executive Department of the Government, this does not place the Auditor beyond the reach of mandamus to compel the performance of purely ministerial public duties appertaining to his office.

To maintain mandamus in this case the relator need not have any pecuniary or other interest in the subject-matter, except such interest as he has in common with the other citizens and taxpayers of the State.

When relief by mandamus is sought merely for the protection of private rights, the relator must show some special or personal interest in the subject-matter, since he is regarded as the real party in interest; but when the question is one of public right, and the object of the mandamus is to procure the enforcement of a public duty, the people are regarded as the real party in interest, and it is sufficient if it appears that the relator is a citizen and as such is interested in the execution of the laws.

V. S. 320, as amended by No. 21, Acts 1904, providing that the legislative committee on claims in making their examination of claims presented against the State, may examine the vouchers, files, and papers in the office of the Auditor of Accounts and papers of his office connected therewith, does not take away any right of inspection which existed at common law.

The Auditor of Accounts may make and enforce such reasonable rules and regulations regarding the inspection of the public records and public documents in his office as may be necessary for their safety, and to prevent disproportional interference with the proper performance of the duties of the office.

PETITION FOR MANDAMUS to the Auditor of Accounts, brought to the Supreme Court for Rutland County at its October Term, 1904. Heard at the January Term, 1905, on petition, answer, and testimony taken and filed. The opinion fully states the case.

Cowles & Moulton for the relator.

The vouchers required by law to be kept in the office of the State Auditor are public records. 24 Am. & Eng. Enc. 159, 170; *State ex rel. Ferry* v. *Williams,* 41 N. J. L. 232; *Payne* v. *Staunton,* 46 S. E. R. 927, 933; *Brown* v. *Knapp,* 54 Mich. 132, 52 Am. Rep. 800; *Mexican R. Co.* v. *Jarvis,* 69 Tex. 527; *Perkins* v. *Cummings,* 66 Vt. 485; *Highsmith* v. *State,* 25 Tex. Supp. 137; *Smith* v. *Lawrence,* 12 Mich. 431; *Carrington* v. *Potter,* 37 Fed. 767; *Noble* v. *Douglass,* 56 Kan. 92; *Cruse* v. *McCauley,* 96 Fed. 369.

A citizen and taxpayer, having a legitimate purpose for so doing, has a right, at proper times and under reasonable regulations, to examine public records. I. Morawetz on Priv. Corps. § 473; *Lewis* v. *Brainard,* 53 Vt. 510; *Com.* v. *Phoenix Iron Co.,* 105 Pa. St. 111; *Matter of Steinway,* 159 N. Y. 250; 4 Thompson on Corps. § 4406; *State ex rel. Wellford* v. *Williams,* 110 Tenn. 549; *State ex rel. Ferry* v. *Williams,* 41 N.

J. L. 332, 32 Am. Rep. 219; *King* v. *Babb*, 3 T. R. 582; *Herbert* v. *Ashburner*, 1 Wils. 297; 2 Dillon Mun. Corps. (4th ed.) § 848; Glover on Mun. Corps. 262; Wilcox on Mun. Corps. 347; Meechem Pub. Officers, § 687; 1 Dillon, § 303; *King* v. *Justices of Leicester*, 4 B. & C. 891, (1825); *Rex* v. *Guardians of Great Farringdon*, 9 B. & C. 541, (1829); *Rex* v. *Justices of Nottingham*, 3 A. & E. 500, (1835); *King* v. *Clear*, 4 B. & C. 899, (1825); *Rex* v. *Vestrymen of St. Marylebone*, 5 A. & E. 268, (1836); *Rex* v. *Justices of Staffordshire*, 6 A. & E. 84, (1837); *Ex parte Briggs*, 1 E. & E. 879, (1859); *Regina* v. *Harrison*, 9 Q. B. 793; *Payne* v. *Staunton*, 46 S. E. R. 927; *People ex rel. Henry* v. *Cornell*, 32 How. Pr. 149; *State ex rel. Colscott* v. *King*, 154 Ind. 621; *Tex.* v. *White*, 74 U. S. 700; *Brewer, State Auditor*, v. *Watson*, 61 Ala. 310.

The right to examine documents includes the right to make copies from them. 4 Thomp. Corps., § 4421; *Clay* v. *Ballard*, 87 Va. 787; *Brouwer* v. *Cotheal*, 10 Barb. 216.

When the examination is sought for a public purpose, the interest of a citizen and taxpayer alone, without any other special or personal interest, is sufficient. *King* v. *Algood*, 7 T. R. 746; *Rex* v. *Merchant Tailor's Ass'n.*, 2 B. & Ad. 115; *Huylar* v. *Craigin Cattle Co.*, 40 N. J. Eq. 392; Beach, Injunctions, § 1300; *Littler* v. *Jayne et al.*, 124 Ill. 123; *Winn* v. *Shaw*, 87 Colo. 631; High, Extra. Rem. (3rd ed.) 431; *People ex rel. Kay* v. *Swanstorm*, 79 App. Div. (N. Y.) 94; 2 Spelling, Extr. Relief, § 1624; *In re Caswell*, 27 L. R. A. 82.

The fact that it would cause inconvenience to permit the examination of the vouchers, is not a sufficient ground for refusing that right. *Burton* v. *Tuite*, 78 Mich. 363; *Silver* v. *People*, 45 Ill. 224; *State* v. *St. Louis Ry. Co.*, 29 Mo. App. 301.

Mandamus is the proper remedy. The relator has no other remedy. *Proprietors of St. Luke's Church* v. *Slack*, 7 Cush. 226; *State* v. *Bruce*, 3 Brev. (So. Car.) 264; *Ellsworth* v. *Doewart*, 95 Iowa 108.

W. W. Miles, and *Horace F. Graham* for the defendant.

Mandamus rests upon a duty to be performed by a public officer, or by some one engaged in the performance of a public duty. 3 Black's Com. 110; *Page* v. *Clopton*, 2 Va. Law J. 560; *Legg* v. *Mayor of Annapolis*, 42 Md. 203; Bouvier's Law Dic. Vol. 11, p. 100 (5th ed.)

According to the rules of pleading, therefore, the relator must expressly allege that defendant owed some duty to him or to the public. 14 Am. & Eng. Enc. (1st ed.) 222; 1 Chit. Pl. (14th ed.) 261, 383.

Mandamus also rests upon the right or interest of the relator in the subject-matter, which the relator must show by clear and distinct allegations of facts showing the right or interest claimed. *Bank* v. *Canal Com.*, 10 Wend. 25; *Amos* v. *Burros*, 11 Ill. 383; *State* v. *Fletcher*, 39 Mo. 388; *State* v. *Everitt*, 52 Mo. 89; *Ex parte Fleming*, 2 Wall. 759.

The relator should have alleged that the vouchers are public records, in order to give him the right to inspect them because he is a citizen and taxpayer. He must also allege facts showing that he has no other adequate remedy. *Richard* v. *Wheeler*, 2 Aik. 369; *Bailey* v. *Oviatt*, 46 Vt. 627; *Sabin* v. *Rounds*, 50 Vt. 74; *Cook* v. *Peacham*, 50 Vt. 231.

A public record is a written memorial made by a public officer, who is authorized by law to make it. That term does not include the files and papers from which the record is made. 2 Bouv. Law. Dic. 849; 2 Am. & Eng. Enc. 474; *Perkins* v. *Cummings*, 66 Vt. 485; *Com.* v. *Rodes*, 1 Dana (Kan.) 595.

If these vouchers are public records, in order to make it the duty of defendant to exhibit them to the relator, he must allege and prove that he has a pecuniary interest in them. *Mitchell* v. *Boardman,* 79 Me. 469; *King* v. *Staffordshire Justices,* 6 A. & E. 99; *Queen* v. *Harrison,* 9 Q. B. 794; *Payne* v. *Staunton* (W. Va.), 46 S. E. 927; *Owens* v. *Woolridge,* 22 Pa. Co. Ct. 237; *Colon* v. *Orr,* 71 Colo. 43.

Such an inspection as the relator demands would take weeks, and possibly months. Such an extended examination will not be granted by mandamus, even if the relator has the right to inspect them. *Buck* v. *Collins,* 21 Am. Rep. 236; *Webber* v. *Townley,* 38 Am. Rep. 213; *Bean* v. *Pope,* 7 Colo. 201; *Cormack* v. *Wolcott,* 37 Kan. 391; *Belt* v. *Abstract Co.,* 10 L. R. A. 212.

WATSON, J. This is a complaint for mandamus to the Auditor of Accounts commanding him forthwith and without delay to exhibit the vouchers on file in his office to the relator, or to his agent and attorney.

The complaint sets forth that the defendant was, and still is, Auditor of Accounts of this State, and as such it was and is his duty to require all bills presented to him for allowance to be fully itemized and accompanied, as far as possible, with vouchers which shall be kept in his office, and at all proper times and under reasonable regulations to exhibit the same, upon request, to any citizen and taxpayer of the State having a legitimate interest therein which an inspection would subserve; that the relator desired to examine said vouchers and to that end employed an agent and attorney to act in his behalf and to make copies of such portions thereof as it should seem advisable. The allegations in the complaint show that the relator personally and by his said agent and attorney at divers times requested the defendant to allow the relator or his said

agent and attorney to examine said vouchers at certain times named, also at any other time upon the reasonable convenience and in the presence of the defendant or his deputy and under any other reasonable regulations, and that the defendant refused and still refuses to comply with such requests. It is further alleged in the complaint that the relator and his agent and attorney are citizens and taxpayers of this State; that the relator had and has a legitimate interest in said vouchers which an inspection will subserve, in that he verily believed and still believes that there have existed and still exist gross negligence and misconduct in the management of the moneys of the State, and that he desired and requested the defendant to allow the examination of said vouchers to the end that the relator might investigate the management of said moneys, and discover such negligence and misconduct, and take such action as he should be advised to correct the same, if found to exist, of which reason he informed the defendant; that the relator cannot make such investigation nor discover any negligence and misconduct, if they exist, except by an examination of said vouchers; that the relator was not and is not actuated herein by motives of idle curiosity; and on information and belief that he has no adequate legal means of redress except by writ of mandamus.

In answer, the defendant denies in positive terms that the relator or his attorney requested the examination of the vouchers for the purpose set forth in the complaint; also that the relator cannot investigate the management of the moneys of the State, nor discover any negligence and misconduct therein, if they exist, except by such an examination; and that the relator has any legitimate interest in or to the vouchers, which an inspection would subserve. No other material allegations in the complaint are denied positively, but some are denied on information and belief, and as to some, the defendant in terms

puts the relator "to his proof" without any specific admission and without a denial in any form. The defendant sets forth in his answer that the reason why he refused the requests of the relator and his attorney to examine said vouchers was that he believed said vouchers were not public records and that under the law he had no right to permit them to be examined in any manner other than that provided by law; also the further reasons that the defendant was busily engaged in completing his biennial report to be submitted to the Governor and had arranged his files and vouchers so that the same might be readily examined and understood by the Committee on Claims of the General Assembly, soon thereafter to be in session, and they thereby be enabled readily to make their report to the General Assembly, as provided in section 320 of the Vermont Statutes; and by submitting the vouchers to the examination of citizens and taxpayers who might desire to examine them, they would become lost or so disarranged and misplaced that they would be nearly if not wholly valueless to the Legislative Committee or to the defendant without great trouble, expense, and delay in rearranging them; and also the further reason that said vouchers and files are no part of the public records of the State which the defendant is under duty by law to keep; but are vouchers belonging to the office of the Auditor of Accounts, justifying him for his allowances and payments thereunder, and his only protection for the issuing of orders upon the State Treasury.

An order was made fixing the time for taking and filing testimony on questions of fact not agreed upon by the parties, and testimony was taken and filed in accordance therewith by both parties.

Certain questions concerning the sufficiency of the complaint are raised by the defendant and he urges that they should be determined upon the general principles of pleading.

At common law and prior to the enactment of the Statute of 9 Anne, ch. 20, no pleadings were allowed in mandamus beyond the return which was taken as conclusive. If the return proved to be false, the only remedy of the relator was by action on the case for a false return. By the Statute of Anne in all cases of mandamus relating to municipal corporations and their officers, it was made lawful for the relator to plead to or traverse all or any of the material facts contained in the return, to which the defendant might reply, take issue, or demur; and such further proceedings are then to be had as could have been had if the relator had brought his action on the case for a false return. *King* v. *Mayor and Aldermen of London*, 3 Barn. & Ad. 255.

Are the provisions of this statute a part of the common law of this State?

In 1779, it was enacted that the "common law, as it is generally practiced and understood in the New England States, be, and is hereby established as the common law of this State." In *Giddings* v. *Smith*, 15 Vt. 344, in discussing this provision of the statute, it is said that "common law, as practiced and understood, probably meant, as considered or altered by statute or by judicial constructions, and as it was adapted to our local circumstances and usages, generally adopted. It is most probable they had reference to the common law as understood and established by usage, or the determination of the courts in Connecticut, as that appears to be the state to which the legislature had particular reference in passing laws."

In construing this statute with its peculiar provisions, reference must be had to the reports of judicial decisions in the several New England States as containing the most certain evidence of how the common law was then practiced and understood. In *Commonwealth* v. *Knowlton*, 2 Mass. 530, the court said: "Our ancestors, when they came into this new

world, claimed the common law as their birthright, and brought it with them, except such parts as were judged inapplicable to their new state and condition. The common law thus claimed was the common law of their native country, as it was amended or altered by English statutes in force at the time of their emigration. Those statutes were never reenacted in this country, but were considered as incorporated into the common law. Some few other English statutes, passed since the emigration, were adopted by our courts, and now have the authority of law derived from long practice." See also *Commonwealth* v. *Leach*, 1 Mass. 59; *Sackett* v. *Sackett*, 8 Pick. 309; *Boynton* v. *Rees*, 9 Pick. 528. And such was the law in Maine, as is seen from the fact that in the Act of Separation from Massachusetts, it was provided that all laws then in force and not repugnant to the constitution should remain and be in force until altered or repealed by the legislature or should expire by their own limitations, which provision was also made a part of the organic law of that state. *Wilcox* v. *Cheviott*, 92 Me. 239. English statutes adopted there have been regarded as a part of their common law. *Colley* v. *Merrill*, 6 Me. 50. In *State* v. *Rollins*, 8 N. H. 550, it is said that prior to the Act of April, 1777, there had been in force the common law, as far as it was applicable to their institutions, the English statutes made in amendment of it before the emigration, and such of those made after as were adopted in practice. See also *State* v. *Moore*, 26 N. H. 448, 59 Am. Dec. 354. In Rhode Island the statute provides that those English statutes, introduced before the Declaration of Independence, which have continued to be practiced under as in force, shall be deemed and taken as a part of the common law and remain in force until otherwise specially provided. Gen. Laws, R. I. 1108; *Bishop* v. *Tripp*, 16 R. I. 198. In Connecticut it is said that the English common law, not unadapted to local circumstances, was

brought thither at the time of the emigration and made their own by practical adoption; and that the same may be said of the ancient English statutes, not penal, whose corrective and equitable principles had become so interwoven with the common law as to be scarcely distinguishable from it. *Fitch* v. *Brainard,* 2 Day 163; *Card* v. *Grinman,* 5 Conn. 164. In *Strong's Case,* Kirby, 345, the action was mandamus, and the court was requested to direct whether the procedure should be governed by the common law, as it stood before the statute of 9 Anne, or by that statute. It was held that the statute should be the rule of proceeding.

The Vermont statute of 1779 was by reenactment to be and remain in force until the rising of the General Assembly in October, 1782. Yet without amending or repealing it, beyond such effect if any by implication, at the June session of that year, after reciting by preamble that it was impossible at once to provide particular statutes adapted to all cases wherein law might be necessary for the happy government of this people, and that the inhabitants of this State had been habituated to conform their manners to the English laws, and held their real estate by English tenures, and that the statute law of England was so connected and interwoven with the common law that our jurisprudence would be incomplete without it, it was enacted "that so much of the common law of England, as is not repugnant to the constitution or to any act of the legislature of this State, be, and is hereby adopted, and shall be, and continue to be, law within the State." And "that such statute laws and parts of laws of the Kingdom of England, as were passed before the first day of October, Anno Domini one thousand seven hundred and sixty, for the alteration and explanation of the common law, and which are not repugnant to the constitution, or some act of the legislature, and are applicable to the circumstances of the State, are hereby adopted and made,

and shall be and continue to be, law within this State; and all courts are to take notice thereof, and govern themselves accordingly."

Although the statute of 1782 is more specific, we think it no broader in meaning and includes no more than the Act of 1779, unless it be because of the date fixed prior to which the English statute may have been passed and yet be within the later act. It was in effect a reenactment of the earlier statute in terms showing how the common law was practiced and understood, with a limitation of statutes included therein. The statute of 1787 specifies such statute laws of England as are "for the explanation of the common law," and in the compilation of 1797, all mention of English statutes as such is omitted, and the provisions adopting the common law are in phraseology much like those contained in section 898 of Vermont Statutes. These various changes in the wording of the statute, however, were not intended to work a change in the law itself, and the statute should be construed as including within the common law adopted, such English statutes as fall within the limitations of the statute of 1782, which as before seen was largely declaratory of the law then existing. That such construction is the one which has been generally accepted and understood appears from its long and frequent application in practice. At common law the defendant in an action at law was confined to a single plea consisting of a single matter of defence to one and the same demand. By the statute of 4 Anne, ch. 16, sec. 4, it was made lawful for any defendant or tenant in any action or suit, or for a plaintiff in replevin, in any court of record, to plead as many several matters thereto, in several distinct pleas, as he should think necessary for his defence. Gould's Pl. VIII., sec. 18-20. Our statute contains no provision for pleading double in this manner, yet such several pleas, appearing on their face to be "according

to the form of the statute in such case made and provided," have ever been permitted in practice within the history of this State. This could be done only by considering the statute of 4 Anne in this respect as a part of the common law. Moreover, other portions of the statute of 9 Anne have been recognized by this Court as a part of our common law. In *State ex rel. Page* v. *Smith,* 48 Vt. 266, the petition was for leave to file an information in the nature of a writ of *quo warranto* against the respondents for usurping and exercising the office of directors of the Central Vermont Railroad. One question was whether, if insufficient cause was shown and leave was granted, a judgment of ouster would be awarded as a matter of right or as a matter of course. The Court said that at the time our statute was enacted and down to the then present time, the practice was settled and uniform in the courts of England, that after leave was granted and the information filed, the respondents had time and opportunity to plead to the information, and pointed out that the fourth section of the statute of 9 Anne required this. It was held that our statute gave merely jurisdiction to this Court of these prerogative writs, and prescribed no forms or rules for proceedings; "but by manifest implication, adopted the function and manner of use of the proceedings then uniformly practiced in the common law courts of England."

Here is a long established construction of our statute which should have the force of judicial determination. *Boyden* v. *Brookline,* 8 Vt. 284. Since the statute, 9 Anne, is applicable to our local situation and circumstances and is not repugnant to the constitution or laws, we think it must be considered as a part of the common law respecting pleadings and proceedings in actions of mandamus falling within its provisions.

In England, by 1 Win. IV. ch. 21, the provisions of the statute of Anne were extended to all cases of mandamus and to the same effect in this State is No. 74, Acts of 1876. By section one of the latter act, in any case proper for a writ of mandamus, the proceedings may be commenced by written complaint addressed to the Supreme Court, setting forth the facts warranting the issue of the writ and the judgment sought thereon, which Court or a judge thereof may thereupon make all proper orders for notice, for the making of answer, for the taking of testimony, for the time and place of hearing the cause, "and for all other matters necessary and required to bring such cause to issue, hearing and determination"; and by section four, upon the hearing, "the Court shall definitely determine the right involved, and render the appropriate judgment in the cause, and as if the writ had issued absolutely in the first instance."

A mandamus proceeding is an action at law and, under the practice in this State, the complaint takes the place of the alternative writ, the answer takes the place of the return, and subsequent pleadings may be had until an issue is joined for trial on the merits. The complaint, answer, and subsequent pleadings are to be governed by the rules of the common law and must contain in substance the essentials of good pleading in an ordinary action at law. *Fairbanks* v. *Sheridan,* 43 N. J. L. 82.

At the close of his answer, the defendant moved to dismiss the complaint on the ground, to the effect, that it does not contain allegations upon which a mandamus can issue; and he specifies in the motion the various omitted allegations which he claims are essential. But the defects there specified, if defects they are, pertain to the right of recovery on the merits and not to the correctness of the proceedings with reference to the complaint or its service. Hence advantage thereof

cannot be taken by motion to dismiss. *Alexander* v. *School District,* 62 Vt. 272; *Marsh* v. *Graves,* 68 Vt. 400; *Noyes* v. *Hyde Park,* 73 Vt. 261. Owing to the importance of the case, however, this motion will be treated as a motion to quash. If the complaint is defective in substance, advantage thereof may be taken by such a motion at any time before the peremptory writ is awarded. This is in principle very closely allied to a writ of error on which a judgment is reversed in a cause where the declaration shows no cause of action, or where the conviction is on an indictment which does not charge an offence. The proceedings fall for want of a proper foundation to sustain them. *King* v. *The Margate Pier Co.,* 3 Barn. & Ald. 224, 5 Eng. C. L. 266; *Rex* v. *College of Physicians,* 5 Burr. 2740; *Bank* v. *Canal Commissioners,* 10 Wend. 26; *Trustees* v. *People,* 12 Ill. 248, 52 Am. Dec. 488; *People* v. *Davis,* 93 Ill. 133.

It is alleged in the complaint respecting the defendant's duty that "as such auditor it was and is his duty to require all bills presented to him for allowance to be fully itemized and accompanied, as far as possible, with vouchers which shall be kept in his office, and at all proper times and under reasonable regulations to exhibit said vouchers, upon request, to any citizen and taxpayer of the State having a legitimate interest therein which an inspection will subserve." It is urged that the complaint is defective in that it does not state how the alleged duty of the defendant to exhibit the vouchers was created, nor facts which show whether it arose from contract or from some express provision of law. But the complaint should be construed in a manner consistent with itself, and when so construed we think the allegations in this respect are sufficient. They in positive terms show the official character of the defendant and his statutory duty to require such vouchers to be presented, and that they shall be kept in his office.

If by reason thereof it is the duty of the auditor to exhibit the vouchers to citizens and taxpayers as alleged in the complaint, —a question presently to be discussed,—it is so because that duty arises at common law. The rule is that courts are bound to take notice of all common law rights and duties and of general customs, and consequently they ought not to be stated in pleading. 1 Chit. Pl. 216; *Winifred Bros.* v. *Rutland R. R. Co.*, 71 Vt. 48.

It is further said that the complaint does not state that there were any such vouchers in the auditor's office at the time of the demand for an inspection and the refusal, nor what they were, nor what they contained; nor in direct or general allegations that the defendant at that time had any vouchers in his possession, nor that it was within his power to comply with the demand. The law making it the duty of the auditor to require vouchers is a public statute of which the Court will take notice, and it will also take notice of the general nature of the vouchers contemplated by that law. The allegations are direct and positive showing that it is these vouchers which the relator requested to be allowed to inspect. It is only necessary to describe the thing to be done with reasonable certainty, with such certainty that the defendant will know what is required of him. And it is held that this rule is peculiarly applicable to public officers who are commanded to perform a public duty, and especially where the facts constituting the act are within their personal knowledge. *People* v. *Nostrand*, 46 N. Y. 375. That such vouchers were in the auditor's office and therefore in his possession at the time of the demand and refusal, need not be averred in the complaint; for the law presumes that all officers intrusted with the custody of public files and records will perform their official duty by keeping them safely in their offices. *Morse* v. *Bruce's Estate*, 70 Vt. 378; *Deshong* v. *City of New York*, 176 N. Y. 475. And

where the law presumes a fact, it need not be stated in pleading. 1 Chit. Pl. 221; Stephen, Pl. 354.

It is insisted that the relator has not sufficiently alleged that he has no other adequate remedy. It is true that the complaint contains no such averment, except on information and belief which is not sufficient. But the fact that he has no other legal remedy is apparent from the other averments in the complaint, and that which already appears sufficiently in the pleading of either party without formal allegation, need not be expressly averred. Gould's Pl. ch. 111, sec. 3.

Furthermore, it is said that the complaint contains no averment that the vouchers in question are public records, nor that the relator has a pecuniary interest in them. If these vouchers are public records, they are so as a matter of law and no allegation thereof is necessary. Whether they are of that character and whether the relator's interest therein must be pecuniary in nature to entitle him to the right of inspection, will be discussed later.

The material facts alleged in the complaint which are denied in the answer only on information and belief, and the facts alleged as to which the defendant answers that he neither admits nor denies, but calls upon the relator for his proof, are in the eye of the law admitted to be true. It is elementary in the rules of pleading that each party tacitly admits all such traversable allegations on the opposite side as he does not traverse. Gould's Pl. ch. 111. sec. 167; *Carpenter* v. *Briggs*, 15 Vt. 34; *Murdock* v. *Hicks*, 50 Vt. 683. Under this rule, denials argumentative are not enough,—*Lyman* v. *Central Vermont R. R. Co.*, 59 Vt. 167,—nor on information and belief for it may be true that the pleader believes as he has been informed, and yet upon the face of the pleadings the fact be as alleged by his adversary. *People* v. *Brooklyn*, 77 N. Y. 503; *People ex rel. Frost* v. *N. Y. C. & H. R. R. R. Co.*, 168 N. Y.

187; *State ex rel. Conran* v. *Williams,* 96 Mo. 13. Nor is refusing to admit or deny an allegation sufficient, since it is in legal effect a refusal to answer at all. *People* v. *Crabb,* 156 Ill. 155. But the allegation that it was and is the duty of the defendant to exhibit said vouchers, upon request, to any citizen and taxpayer of the State having a legitimate interest therein which an inspection would subserve, is not admitted under this rule, since the allegation is but a conclusion of law from the facts stated, and not traversable. Gould's Pl. ch. VII. sec. 48.

No traverse to the answer was filed by the relator. When such is the state of the pleadings the matters in controversy are usually determined on the complaint and answer. But in this case testimony was taken, filed, and used at the hearing by both parties without objection. They thereby treated the case as if a traverse had been filed and we treat it in the same way.

The defendant denies that the vouchers which the relator wished to inspect are public records, and if this contention is sound it is decisive against the existence of the right of inspection claimed by the relator.

Of what do the vouchers consist? In determining this question, it becomes necessary to examine the statute prescribing the auditor's duties. By Vermont Statutes, sec. 306, "He shall examine and adjust all claims against the State, not otherwise specially provided for by law, in favor of persons acting under the authority of the State or of the executive, including military accounts referred to him by the Governor, and allow such sums as he finds justly due, and draw orders on the State Treasurer therefor." Sec. 307, "He may examine the claimant or other person under oath, and for that purpose may administer oaths, and shall require proof of a claim equivalent to testimony upon oath, or a certificate of some commissioned

officer of the State officially cognizant of the claim." Sec. 308, "He shall make a record of claims presented, and when he disallows a claim in whole or in part, he shall, at the request of the claimant, refer such claim to the General Assembly. If the claimant neglects to apply to the General Assembly at the next session, or if it acts upon said claim, allowing it in whole or in part, or rejecting it, the claim shall be treated as adjudicated." Sec. 309, "He shall when a claim is allowed either in whole or in part by himself or the General Assembly upon his reference place the original account or evidence of the claim on file, and draw an order upon the State Treasurer, giving the nature of the claim, payable upon the tenth day of the succeeding month, or at sight in his discretion; but he shall not deliver such order until the claimant gives him a receipt in full for such claim." Sec. 328, "All state officers whose duty it is to disburse moneys belonging to the State, shall make returns to the State Auditor, and embody in their biennial reports, itemized statements of all their expenses and disbursements." Sec. 329, "The State Auditor shall make a settlement at least once in each fiscal year with the sergeant-at-arms, quartermaster general, county clerks, superintendents of the state prison, house of correction, Vermont industrial school, Vermont asylum, and soldiers' home, the secretary of the board of agriculture, fish commissioners and any other officer who disburses moneys appropriated by the State, and adjust their accounts, and draw an order for any balance due them; and he shall require them to pay into the treasury any balance due the State." Sec. 305, "He shall require all bills presented to him for allowance to be fully itemized and accompanied, as far as possible, with vouchers, which shall be kept in his office," and by sec. 327, "He shall allow no claim not based on law, nor draw an order except in pursuance of law; and no other officer shall draw orders on the State Treasurer."

The law of all other sections in chapter twenty-four of the Vermont Statutes, except of section 299 which relates solely to the oath of office, was in force when section 305 was enacted as No. 8 of the Laws of 1892.

The term "bill," as used in the last named section, includes all claims and accounts which by law may be presented to the auditor for allowance; and the term "vouchers," as there used, includes all books, papers, receipts, receipted bills, and documents which serve to prove the truth of the claims and accounts so presented.

It is a basic principle of evidence that where a document is of a public nature, a copy of it is evidence, for the production of the original is dispensed with on account of the inconvenience which would result from the frequent removal of public documents, and consequently the absence of the original affords no presumption of fraud. Stark. Ev. Part III, sec. 14; *Lynch* v. *Clarke,* 3 Salk. 154, 11 Eng. R. C. 450; Wigmore, Ev. sec. 1218; *Mattocks* v. *Bellamy,* 8 Vt. 463.

True, under this rule, it has been held in England that copies of the books of the Bank of England and of the East India Company, and perhaps of some other companies, legally private corporations, might be used since the books are not removable on the ground of public inconvenience. But these books have been held to be of a public nature. Thus they are brought within the rule rather than made an exception to it. *Marsh* v. *Colluett,* 2 Esp. 665, 11 Eng. R. C. 508; *Doe* v. *Roberts,* 13 M. & W. 520. The same is true regarding the books of the Bank of the State of Alabama and its branches. The banks are held to be the property of the public and their books are held to be public writings. *Crawford* v. *Bank,* 8 Ala. 79. In the case of *People* v. *Hurst,* 41 Mich. 328, the rule seems to be extended to banks generally, and there may be other instances of like nature. The generally recognized rule,

however, at common law is that this principle does not apply to documents of a private nature. Respecting them, a copy is not evidence unless the original is lost, destroyed, or in the hands of a third person who cannot be compelled to produce it.

In Wigmore on Evidence, sec. 1218, in stating the conceivable scope of this principle allowing proof by copies, it is said among other things: (1) "when by statute or regulation a document in official custody is expressly or impliedly *forbidden to be removed,* it is clear that the principle applies and production dispensed with. (2) Where the document is one of the *working documents* of the office containing the official doings or being a paper made and consulted there officially in the course of office duty, it is equally clear that it need not be produced. (3) When the document is one made by a *private person* and *filed* in a public office, the principle does not apply, if a statute or regulation does not expressly require it to be filed and kept there; if it does so require, then the principle applies; although the rulings lay down no clear distinction on the subject, and most of the instances are dealt with by a statute in general or specific terms. (4) Where the document is one made by a private person and required by law to be *recorded* in the public office but not to be kept there, the principle does not at common law apply. (5) Where the document is made by a public officer and is delivered, after being recorded, to a private person (as a government land certificate), the principle does not apply; but by statute in many instances it has either been made to apply or the record has been constituted the basis of title, so that the record, as the original being in official custody, need not be produced."

It will be observed by this classification that in all instances where by law or regulation the document is filed in a public office and required to be kept there, it is of a public nature as far as the law of evidence is concerned. The same

test has often been applied, and we think rightly so, in determining the nature of books and documents in proceedings to compel the allowance of their inspection.

Claims are not to be allowed against the State unless they are based on law and are supported by evidence equivalent to testimony upon oath, or a certificate of some commissioned officer of the State officially cognizant of the claim. By the provision of the statute that vouchers shall be required by the Auditor to accompany as far as possible all bills presented for allowance, the General Assembly has declared for the production of that which, in contemplation of law, is generally the best evidence for that purpose. And that this evidence may be preserved for any future use or examination which may lawfully be had, the statute provides that the vouchers, whatever may be their specific nature, shall be filed and kept in the Auditor's office. Certainly they are within the first class named by Wigmore, and may be within the third. If vouchers so used, filed, and kept were not before of a public nature because made or presented by some other public officer in the discharge of a public duty, they thereby are stamped with that character and thenceforth are public documents. *Brown* v. *County Treasurer,* 54 Mich. 132, 52 Am. Rep. 800; *Ferry* v. *Williams,* 12 Vroom 332, 32 Am. Rep. 219; *People* v. *Jewell,* (Mich.) 101 N. W. 835; *Conran* v. *Williams,* before cited; *Clay* v. *Ballard,* 87 Va. 787.

The same principle was applied in *State ex rel. Cook* v. *Reed, Treasurer,* 36 Wash. 638, 79 Pac. 306, but the writ was denied, since the stub books which the relator asked to examine were kept by the treasurer of his own volition and for his own convenience and were not public records such as he was required by law to keep. Also in *Leffingwell* v. *Miller* (Colo.) 79 Pac. 327, where the appellee sought by mandamus proceedings to compel the appellant to deliver over to him, as suc-

cessor in office, certain books alleged to pertain to the office of city engineer. The books which the defendant refused so to deliver contained field notes made by him in surveying lots of individual owners upon their application, in his individual and not official capacity. It was held that the field notes made in performing such work were the defendant's private property and did not pertain to the office of city engineer, hence the proceedings were dismissed.

Moreover, it would seem that all vouchers, files, papers, and records required by law to be kept in the office of the Auditor of Accounts are, by the law-making power, deemed of a public character; for at the last session of the General Assembly the Auditor was made a certifying officer whose certified copy of any such voucher, file, paper, or record, shall be admitted in evidence in any suit, civil or criminal. And it is made his duty to furnish such copies to any person desiring the same on the payment or tender of the specified legal fee therefor. Laws of 1904, No. 24.

Since the vouchers in question are public documents in a public office, the question arises whether citizens and taxpayers of the State have a right to inspect them. In I Tidd's Prac., Fourth Am. ed., p. 593, it is laid down as a general rule that a party has a right to inspect and take copies of such books, etc., as are of *public* nature, wherein he has an interest. And regarding the inspection of public documents, it is said in 1 Greenleaf on Evidence, sec. 471, "it has been admitted, from a very early period, that the inspection and exemplification of the records of the King's Courts is the common right of the subject." It further appears from the same author that, when not injurious to the public interests, inspection of books of public officers will be granted in favor of persons who have an interest therein. And when no action is pending the proper course is to make appli-

cation for a rule to show cause why a mandamus should not issue, commanding the officer in custody of the books to permit an inspection thereof and the taking of copies, stating in the application the object sought by the inspection. Sec. 474-478. By a law in Virginia, the secretary of the Electoral Board in the several counties and cities of the commonwealth is required to keep in a book to be provided for that purpose, an accurate account of all the proceedings of the Board, including all appointments and removals of judges of election and registrars. The printing of official ballots and their distribution to the judges of election of the several precincts in their county or city is delegated to this board. In *Gleaves and Others* v. *Terry,* 93 Va. 491, the relators, citizens and voters of Wythe County, prayed for a mandamus commanding the defendant, secretary of the Electoral Board of that county, to allow the relators to examine the records of said board and to take memoranda or copies thereof. It was held that the preparation of the ballot, its verification, and the stamping of the seal of the board thereon were required by statute to be performed in secret, and that so much of the record of the proceedings of the Board as related thereto was not a public record which was open to inspection by any one other than the officers whose duty it was to prepare the ballot, etc. But that so much of the record of the proceedings of the Board as related to the appointment and removal of judges and commissioners of election and registrars or the ordering of a new registration, was a public record open to inspection by any citizen or voter of the county and that he might take memoranda or notes of the proceedings therefrom. See also *Burton* v. *Tuite,* 78 Mich. 363.

We think it may be safely said that at common law, when not detrimental to the public interest, the right to inspect public records and public documents exists with all persons who

have a sufficient interest in the subject-matter thereof to answer the requirements of the law governing that question. Furthermore, we think the existence of this right in respect to vouchers, files, papers, and records in the office of the Auditor of Accounts is impliedly recognized by the Act of 1904, to which reference has been made, since the full and intelligent exercise of the right to certified copies is dependent upon the right of inspection to ascertain of what particular records and documents copies are desired. In Alabama it has been held that a similar statute requiring the auditor of the state, on application and payment of legal fees therefor, to furnish a certified copy of any paper required to be kept in his office, implies that there is a right first to see the paper, for how, asks the Court, could it otherwise be known whether or not it could be of any use? *Brewer* v. *Watson,* 61 Ala. 310.

It appears from the evidence taken, as well as from the allegations in the complaint, that the relator has no particular right or interest to be protected by the inspection requested, independent of that which he holds in common with all other citizens and taxpayers of the State.

Is this a sufficient interest to entitle him to the relief sought?

As a part of our organic law, it is laid down: "That all power being originally inherent in and consequently derived from the people, therefore, all officers of government, whether legislative or executive, are their trustees and servants; and at all times, in a legal way, accountable to them." Const. Art. 6. It has been said by an eminent writer in speaking of the American Nation,—and it is no less true when applied to one of the individual states,—"every man knows that he is himself a part of the government, bound by duty as well as by self-interest to devote part of his time and thought to it." Again the same writer says: "The American citizen is virtually one of the gov-

ernors of the republic. Issues are decided and rulers selected by the direct popular vote. Elections are so frequent that to do his duty at them, a citizen ought to be constantly watching public affairs with a full comprehension of the principles involved in them, and a judgment of the candidates derived from a criticism of their arguments as well as a recollection of their past careers." 2 Bryce, Am. Com. 277.

The testimony of the relator shows that he believes that there have been and still are gross negligence and misconduct in the management of the moneys of the State, because it appears from the Auditor's published reports that for the thirty years ending June 30, 1901, the total current expenses of the State increased about one hundred twenty-five per cent., and that for the last biennial period, the average annual increase was more than ninety-eight thousand dollars, that the total expense for the care of the insane increased during the ten years ending June 30, 1901, about one hundred twelve per cent., while the population of the State during the thirty years before mentioned increased only about four per cent. His testimony further shows that in the published reports of the Auditor sufficient detail of the expenses in the various departments is not given to render it possible to ascertain therefrom in what departments there has been an undue and unreasonable increase of expenses, but that the vouchers on file in the Auditor's office contain such details and an examination of them is the only means of obtaining the information; that a full knowledge of these details is indispensable to a full understanding of the matter and for the adoption of such reform in the accounting department and the various other departments of the State as will reduce the expenses to the proper amount; and that his purpose is to have an investigation made of the Auditor's accounts for the receipt and disbursement of the State's money. The relator denies that in seeking this

inspection he is actuated at all by motives of curiosity, but his purpose is to understand all such items of expense, to analyze the same, make up proper statements therefrom which will show wherein the various items of expense are unnecessary or excessive, bring the matters before the voters of the State, and personally together with other citizens and taxpayers to advocate and bring about reforms in the Auditor's and other departments of the State, which will reduce the expenses to the proper amount and thereby save the State large sums of money.

As before seen the statute points out the way to be followed by the Auditor of Accounts in the performance of his duties in passing upon claims presented for allowance, and "he shall allow no claim not based on law nor draw any order except in pursuance of law." Whether these injunctions have been and are followed in the performance of the duties of that office is a question involving public rights in which all citizens and taxpayers are alike interested. If by negligence or misconduct, to use the words of the complaint, bills have been or are being allowed contrary to the plain intent and meaning of the law, public policy demands that such evils be remedied and that all proper facilities shall be afforded to bring about this result. For this purpose, under reasonable rules and regulations to inspect the public records and public documents there kept, is a right which rests with the citizens and taxpayers of the State. It logically follows that, as correlative to this right, it is a legal duty which the Auditor owes to the public by virtue of his office to accord that right, when in contemplation of the law an occasion has arisen for its exercise. This duty is ministerial in its nature, and so clear and specific that no element of discretion nor of official judgment is involved in its performance. The refusal to perform it under circumstances where the law requires it, is a detriment to the public interests and mandamus will be awarded in a case which shows

facts essential to the granting of such relief. High Extr. Legal Rem., sec. 24.

It is true that the office of Auditor of Accounts is a branch of the executive department of the State, but this does not place the incumbent of that office beyond the reach of the remedy here invoked to compel the performance of purely ministerial public duties which appertain to his office. In the case of *United States* v. *Black,* 128 U. S. 40, 32 L. ed. 354, the relator made application for a writ of mandamus to be directed to the defendant Black, as Commissioner of Pensions, commanding him to reissue to the relator his pension certificate. In the opinion by Mr. Justice Bradley, upon an examination of the cases previously before that Court involving the question of when such a writ may and when it may not be granted against executive officers of government, the following principle of law is deduced: "The Court will not interfere by mandamus with the executive officers of the government in the exercise of their ordinary official duties, even where those duties require an interpretation of the law, the Court having no appellate power for that purpose; but when they refuse to act in a case at all, or when, by special statute, or otherwise, a mere ministerial duty is imposed upon them, that is, a service which they are bound to perform without further question, then, if they refuse, a mandamus may be issued to compel them." *Marbury* v. *Madison,* 5 U. S. 137, 2 L. ed. 60; *McBride* v. *Schurz,* 102 U. S. 378, 26 L. ed. 167; *Kendall* v. *United States,* 37 U. S. 524, 9 L. ed. 1181.

It is contended by the defendant that to maintain mandamus the relator must show some pecuniary interest in the subject-matter, and in support of this contention, numerous cases are cited from other jurisdictions which so hold. We think the true rule, however, is that stated by Mr. High in his work above cited, sec. 431. He says: "A distinction is

taken between cases where the extraordinary aid of a mandamus is invoked merely for the purpose of enforcing or protecting a private right, unconnected with the public interest, and cases where the purpose of the application is the enforcement of a purely public right, where the people at large are the real party in interest. And while the authorities are somewhat conflicting, yet the decided weight of authority supports the proposition that, where the relief is sought merely for the protection of private rights, the relator must show some personal or special interest in the subject-matter since he is regarded as the real party in interest and his right must clearly appear. Upon the other hand, when the question is one of public right and the object of the mandamus is to procure the enforcement of a public duty, the people are regarded as the real party in interest, and the relator at whose instigation the proceedings are instituted need not show that he has any legal or special interest in the result, it being sufficient to show that he is a citizen and as such interested in the execution of the laws."

In *Union Pacific R. R. Co.* v. *Hall and Morse,* 91 U. S. 343, 23 L. ed. 428, the plaintiff in error had built its railroad with the eastern terminus at Omaha, Nebraska. The defendants in error contended that by the charter of the road, the eastern terminus must be at Council Bluffs, Iowa, and that the road must be operated as one continuous line westward therefrom. The defendants in error sought a writ of mandamus to enforce the building of a bridge across the Missouri River between Omaha and Council Bluffs, and the operation of the road according to law. One question raised was whether Hall and Morse, the defendants in error, could lawfully become relators in a suit in behalf of the public without the assent or direction of the Attorney-General of the United States, or of the district attorney of the District of Iowa, to

compel the performance of a public duty. Hall and Morse were merchants in Iowa, having frequent occasion to receive and ship goods over the company's road; but they had no interest other than such as belonged to others engaged in like employments, and the duty they sought to enforce by the writ was a duty to the public generally; thus presenting the question whether a writ of mandamus to compel the performance of a public duty may be issued at the instance of a private relator. After recognizing the fact that in this country there had been a diversity of decision upon that question, unless the non-performance of the public duty worked a special injury to the relator, the Court, speaking through Mr. Justice Strong and citing many authorities, said: "There is, we think, a decided preponderance of American authority in favor of the doctrine that private persons may move for a mandamus to enforce a public duty, not due to the government as such, without the intervention of the government law officer." In *Clay* v. *Ballard,* 87 Va. 787, the relator, a legalized voter, sought a writ of mandamus to compel the registrar of a certain election district to allow him to inspect and take copies of the registration books of the district. It was held that the relator had the right of inspection which included the right to take copies, both at common law and by statute, and that the duty, performance of which was sought to be coerced, was a public duty, and hence the interest which the relator as a citizen had in the enforcement of the laws was a sufficient interest to entitle him to maintain the proceeding. In *Payne* v. *Staunton,* 55 W. Va. 202, an election was held in Kanawha County under a statute for that purpose, upon the question whether bonds should be issued to fund the indebtedness of the county. The returns of the election were made and canvassed, the result ascertained, and the poll-books and ballots were returned to the office of the clerk of the county court. The relators

applied to the defendant, clerk of the county court, to be allowed to inspect the poll-books of the election for all the precincts of the county, which he refused. They then demanded that the clerk make them certified copies of certain ones of the poll-books, offering to pay therefor, which demand was also refused. The mandamus proceedings were brought to compel the clerk to allow such inspection and to furnish such copies as the relators might require. Among other things, it was contended by the defendant that the relators could not join in a mandamus. Hereon the Court said that without strain it may be said that all citizens have a common interest in seeing that records in a clerk's office are preserved and that proper inspection be granted, as it is that the county be supplied with a court house. "Is this not a matter of common public right, and may not citizens unite to vindicate it?" But as the relators united in the demand for inspection, the demand was joint, the refusal to all in common, and the wrong a single one to all alike. The case of *King* v. *Justices of Leicester,* 4 B. & C. 891, obviously in many features is similar to the one before us. The Attorney-General obtained a rule against the defendants to show cause why a mandamus should not issue, commanding them and the clerk of the peace of the borough of Leicester, "to permit and suffer the parishioners of the parish of Saint Martin, in said borough, or any of them, to inspect and take copies of all orders of sessions, rates, and other proceedings of the general quarter sessions of the said borough, relative to rates imposed upon the said parishioners by the justices of the said borough, or to which they are contributory, and all accounts and documents relating thereto." The rule was obtained on an affidavit made by two rated inhabitants of the parish, stating in substance that the rates had recently become very burdensome to the inhabitants, and that although an abstract of the treasurer's receipts and expendi-

ture had of late years been annually published, yet such abstract did not afford due information to the contributors to said rate; that the money levied upon them was expended for such purposes only to which the same was applicable by law; that upon due investigation they doubted not, and believed it would appear, that the said justices had raised greater sums upon the inhabitants than were necessary and warranted by law; and that the parishioners, being desirous of obtaining better information respecting the purposes to which the money raised by such rate was applied, an application had been made by Samuel Miles, attorney for the inhabitants of the parish, to be permitted to inspect and take copies of all such orders of sessions, rates, and other proceedings, and all accounts and documents relating thereto. In answer, an affidavit stated that an abstract of the treasurer's accounts of all his receipts and expenditure had been published each year according to the statute, and the affidavit set forth the abstract published for the last two years. In argument, the points were made for the defendants that the affidavit upon which the rule was granted did not allege any particular grievance or instance of misapplication of the funds in question, but merely stated that the deponents "doubted not" and "believed" that such misapplication would appear to have been made; that no statute gave such right of inspection; and that the statute points out the way by which the public are to be made acquainted with the expenditure of the county rate, namely, by publication of an abstract of all the treasurer's receipts and expenditure, signed by the justices who audited the same, once a year in a public local newspaper, which had always been done. In reply to the last point, it was urged that the abstracts published and set forth in the answer were not sufficient to give the contributors the information they required, and that every rate-paying inhabitant had the right to inspect and take copies. Abbott,

C. J., directed a mandamus to issue to permit Miles, on behalf of the parishioners, to inspect and take copies of the last two rates or assessments made by the justices for the said borough, and all orders made for the expenditure of the same, and the several orders of sessions made thereon, and other proceedings and documents relating thereto, and that thus the rule be made absolute.

In *Rex* v. *Guardians, etc. of Great Faringdon,* 9 B. & C. 541, a rule *nisi* for a mandamus to the guardians, churchwardens, and overseers of the poor of the parish of Great Faringdon, commanding them to allow R. B. Gill, an inhabitant of the parish and liable and entitled to be rated to the rates for the relief of the poor therein, to inspect the books of accounts of the receipts, expenditure, and application of the rates of the parish, and to take copies thereof and abstracts therefrom at his own costs. It appeared by affidavit that the accounts of the guardians, with the vouchers, were regularly produced at a meeting held the first Monday in every month, for the inspection and examination of the parishioners, and were so inspected and examined; that at a meeting named, such accounts for the last year were produced for the inspection of the parishioners, and having been approved, were verified upon oath by the acting guardian, etc. Lord Tenterden, C. J., said: "We have no doubt that the party is entitled to inspect the books at a reasonable time. * * * He has a right to see what has been done. The rule therefore must be made absolute." And in *Rex* v. *Justices of Staffordshire,* 6 A. & E. 84, Lord Denman, C. J., said: "We are by no means disposed to narrow our own authority to enforce by mandamus the production of every document of a public nature, in which any one of the King's subjects can prove himself interested. For such persons, indeed, every officer appointed by law to keep records ought to deem himself for that purpose a trustee."

In *State ex rel. Thomas* v. *Hoblitzelle,* 85 Mo. 620, the case was an appeal from the judgment of the Circuit Court of the city of St. Louis, awarding a peremptory writ of mandamus directing the defendant to allow the relator to inspect the registration lists, poll-books, and lists used in the election recently held in that city and on file in the office of the defendant as recorder of voters. At that election, the relator was a candidate for the office of city marshal and one Neiser was also a candidate for the same office and received a certificate of election. The relator alleged that he received a majority of the votes cast and was in fact duly elected; that he intended to contest the election with a view of establishing his right to the office; and that for the purpose of preparing for such contest he demanded of the defendant that he and his attorney be permitted to inspect the registration list and poll-books used at the election, which defendant refused. It was held by an undivided court that the peremptory writ should issue. Sherwood, J., wrote a concurring opinion with which Henry, C. J., agreed. Therein it said that the right of citizenship alone confers the right of relatorship in case of this sort, and "the records being public ones; records pertaining to the preservation of the evidence of the exercise of one of the highest and most sacred rights of a freeman; a right which constitutes the foundation stone of American liberty and national government, it is not too much to say that the right, within reasonable bounds, of inspecting such records is no less broad than the right of citizenship on which it rests." In a later case before the same court,—*State ex rel. Conran* v. *Williams,* 96 Mo. 13,—the right to take copies of these registration books and registration lists to be used by a voluntary political organization at a primary election to be held in the city of St. Louis under a primary election law was in question. The relators constituted the democratic central commit-

tee of that city. It was held that the registration lists were public records and as such were competent evidence at such elections, and that since they were public records the right to inspect carried with it the right to take copies.

By a provision in the charter of the town of Orange in the State of New Jersey, no person should be allowed to sell ale, etc., within the city limits, unless he was first licensed by the collector of taxes, had paid a license fee, and had filed with the collector a letter of recommendation signed by six legal voters and freeholders who had signed no other recommendation within a year to the effect that the applicant for a license was of good moral character and of good repute for temperance. In *Ferry* v. *Williams,* 12 Vroom 332, 32 Am. Rep. 219, the relator, a citizen of Orange, believing that the requirements of the law as to these letters of recommendation were not obeyed and desiring with other citizens to secure a due observance of its provisions, applied to the collector of taxes for an inspection of the letters on which then existing licenses had been granted. This request was refused and the relator sought a writ of mandamus to enforce his alleged right of inspection, the existence of which right the collector denied. There was no statute in the state on the subject, hence the case was determined on common law principles. The relator asserted no interest to be subserved by the inspection desired, except that common interest which every citizen has in the enforcement of the laws. It was held that the relator was entitled to an inspection of the letters and the writ was granted.

In *State ex rel. Wellford* v. *Williams,* 110 Tenn. 549, L. R. A. 418, the relator, a resident citizen and taxpayer of the city of Memphis, alleged that the defendant was mayor and chief executive of the city and as such had the custody of its books on which were kept the receipts and expenditures of the funds of the city; that in the said receipts and expenditures, he, as a

citizen and taxpayer, had a direct interest; that some time before the filing of the petition, he uninvited attended a meeting of two hundred invited citizens, called by the mayor for the purpose of devising ways and means to assist the city to pave, repair, and "round up" more or less, the streets of the city, and being interested in the material prosperity of the city, he afterward attended a meeting of a committee of fifteen appointed at the aforesaid meeting of citizens; that the relator, being interested as a corporator and taxpayer, the financial condition of the city showing necessity for the providing of additional means for the purpose aforesaid and the tax rate being very high and burdensome, he later demanded of the defendant the right to make an examination of the books, records, papers, and vouchers in his possession, claiming the right to make a general inspection of the public records of the city and to make copies of its public documents and records, under such rules and regulations as would ensure their safety; which demand was refused. In disposing of the case in favor of the relator, upon an examination of many authorities both English and American, the Court said that under the circumstances it was natural that a citizen and taxpayer should desire to know the exact condition of the city's finances, and the plan of a thorough and exhaustive examination necessarily arose in the mind; and that the purpose which he professed was to ascertain the real condition of affairs, how much money had come in, and where it had gone to, as a necessary preliminary to fiscal ameliorations; that it cannot be doubted under a state of facts showing it to be important to the public interest that the general examination of the books of a municipality should be had, that the Court should allow such examination at the suit of one who is a citizen and taxpayer of the corporation; that the right rests not only on the ground that the books are public books, but also on the same principle that authorizes a

taxpayer to enjoin the enforcement of illegal contracts entered into by the municipality, county, or state, for the protection of the applicant and all other taxpayers from illegal burdens; that it is obvious that in making and enforcing such application the taxpayer acts, in a very real sense, not only for himself but for all other taxpayers; and acts therefore in the capacity, as it were, of a trustee for all; and that it must be admitted also that the exercise of such power, if prudently and carefully guarded, cannot be otherwise than salutary, because the knowledge that it can be exercised by a citizen and taxpayer, and may be exercised when the public good shall seem, on sound reason, to demand it, cannot result otherwise than in producing an added sense of responsibility in those who administer the affairs of municipal corporations, and in inducing a greater carefulness in the discharge of the trusts imposed upon them by their fellow-citizens under the sanction of law.

In *State ex rel. Colscott* v. *King*, 154 Ind. 621, the case was heard on demurrer to a petition for a writ of mandamus against the auditor of Franklin County to compel him to allow the relator an inspection of the public records and papers of the auditor's office. The relator was a citizen and taxpayer of the county and averred in his petition that he prosecuted the suit on his own behalf and on behalf of all other citizens and taxpayers in the county who were aggrieved by the wrongs set out in the petition; that he desired such inspection for the purpose of ascertaining whether said books and records, etc., were legally and properly kept, and especially for the purpose of discovering whether the money and property of the county had been duly accounted for by the persons and officers charged with the collection and disbursement of the same, and to ascertain whether any money was due to the county from any person or persons; and that he desired such inspection and the information to be obtained thereby as a citizen and taxpayer

for the purpose of pursuing, if necessary, the proper legal remedies to enforce the collection of any money or demands that may be due the county, and to require the proper authorities to enforce such demands. On demand the auditor refused to allow such inspection. In that state, there was a statute providing that "all the books, accounts, vouchers, papers and documents, touching the business or property of the county, shall be carefully kept by the auditor and open to the inspection of any person." No interest was asserted by the relator other than that which was common to all citizens and taxpayers of the county. It was held that, aside from the statute, the relator had shown by the facts presented such an interest in the matters to which the records and papers in question related, as would entitle him to a general inspection thereof for the purpose which he had in view. Speaking of the rights of the people, the Court said: "As taxpayers they contribute to the public revenue, and as voters they select the public officials who are to administer the county's affairs. Surely, under such circumstances, they retain or have a great interest in the proper management of the business and matters pertaining to their county, and therefore are entitled to know whether the public officials whom they have selected to represent them have properly used, disbursed, and accounted for the public funds which, under the law, have been confided to their custody and administration."

The statute provides that the Auditor's biennial report shall be examined by the Committee on Claims of the General Assembly in order to correct allowances which appear excessive; and that such committee shall examine his record of claims presented against the State, and his proceedings thereon, and make report to the General Assembly. V. S. 320. In 1904, this section was so amended that the committee in making their examination of the record of claims presented against

the State and the Auditor's proceedings thereon, may examine the vouchers, files, and papers of his office connected therewith, and that the meetings of such committee shall be open to the general public. Laws of 1904, No. 21. But the examination by the committee is not exclusive. It cannot be said that this statute either expressly or impliedly takes away any right of inspection which may exist at common law. There is nothing indicating that such was the intention of the Legislature. In *State ex rel. Colscott* v. *King*, it was contended that the statutory right and duty of the county commissioners to inspect and examine the records must be held to be an exclusive one, and impliedly deprived any citizen or taxpayer of that right when he sought it for the purpose which the relator in that case had in view. But it was held that there was no force in this contention. And the case of *State ex rel. Wellford* v. *Williams* is to the same effect. See also *King* v. *Justices of Leicester*, and *Rex* v. *Guardians, etc. of Great Faringdon*, before cited.

Upon principle and authority we think the interest of the relator, as a citizen and taxpayer, in the matters and things to which the vouchers in question pertain is sufficient to entitle him to an inspection of the vouchers for the purpose which he has stated.

We are asked in the exercise of discretion not to grant the relief sought. But it is clear that the relator has no other adequate remedy, and the fact that the allowance of such inspection by citizens and taxpayers will be an inconvenience to the office of Auditor of Accounts or to those legally in charge thereof, affords no good reason for refusing it. The Auditor of Accounts is the lawful custodian of the public records and public documents in that office and is responsible for their safe keeping; and he may make and enforce such reasonable rules and regulations regarding their inspection as may be necessary for their safety, and to prevent disproportional interference

with the proper performance of the duties of the office, and consistent with the public right here declared.

Judgment that the prayer of the complaint is granted, and that a mandamus issue directing the Auditor of Accounts to grant the inspection of the vouchers in question to the relator and his said agent and attorney, under such reasonable rules and regulations as he may prescribe therefor consistent with the public right, without costs.

MUNSON and HASELTON, JJ., dissent.

START, J., by reason of his illness took no active part in the decision of this case.

PRUCIUS W. MANLEY *v.* VERMONT MUTUAL FIRE INSURANCE COMPANY.

May Term, 1905.

Present: ROWELL, C. J., TYLER, MUNSON, START, HASELTON, and POWERS, JJ.

Opinion filed February 2, 1906.

Fire Insurance—Contract Adjusting Undisputed Loss—Accord and Satisfaction—Consideration—Promise to Perform Existing Obligation.

An unexecuted accord is no bar to an action on the original contract. Where a creditor accepts in satisfaction of his debt the mere promise of the debtor to do some act which he is not already legally bound to perform, that promise, though never fulfilled, constitutes an executed accord, and extinguishes the debt.

But a promise to perform the promisor's subsisting legal contract with the promisee, affords no consideration for the latter's promise, creates no duty, and cannot support an action.

On July 13, and while a fire insurance policy issued by defendant to plaintiff was in force, the property thereby insured was entirely destroyed by fire. The next day plaintiff met defendant's adjuster, and, without any controversy arising either as to the amount of the loss or defendant's liability therefor, made out a sworn proof of loss showing items of damage aggregating $500.37, to which was appended an agreement, signed by plaintiff, that if defendant should "allow the sum of $500.37 on this claim, it shall be accepted by the undersigned as a full, final adjustment of the same," payable at the time and in the manner specified in the policy for the payment of any loss thereunder. About August 4, plaintiff received a letter from defendant, enclosing a receipt for him to sign, and informing him that defendant's directors had allowed said sum, and that defendant's check would be forwarded to him upon the return of said receipt properly signed; whereupon he signed and returned the receipt. Later plantiff filed with defendant an additional proof of loss purporting to cover property omitted from the original proof by mistake, refused to accept $500.37 in settlement, and brought suit on the policy. *Held*, that said agreement is a mere accord executory, and does not bar an action on the policy; that as there was no dispute, said agreement was not a compromise; and that, as by said agreement plaintiff agreed to accept what he was already bound to accept, and defendant merely agreed to pay what it was already bound to pay, both at the time and in the manner specified in the policy, there was no consideration for said adjustment agreement.

ASSUMPSIT on a fire insurance policy. Plea, the general issue with notice of the tender and of the other special matter mentioned in the opinion. Trial by jury at the September Term, 1904, Windsor County, *Watson*, J., presiding. Verdict ordered for the defendant to recover its costs since the time of the tender; and judgment thereon. The plaintiff excepted. The opinion fully states the case.

F. D. E. Stowe for the plaintiff.

The adjustment contract always remained executory. Such a contract must be fully performed in order to bar an action on the policy. *Smith* v. *Ins. Co.*, 62 N. Y. 85; Clement Fire Ins. Rule 7, p. 49; Rule 8, p. 50; *Platt* v. *Ins. Co.*, 62 Vt. 170; 7 Am. & Eng. Enc. 1046.

E. L. Waterman, J. L. Martin, and *E. W. Gibson,* for the defendant.

The acceptance on the part of the defendant company was absolute and identical with the terms of the offer. The transaction has all the elements of a binding contract. The company did all it could to carry out the agreement. Clark, Contracts, 42; Anson, Contracts, 3 and 5; *Abbott* v. *Shepard,* 48 N. H. 14; *Tayloe* v. *Ins. Co.*, 50 U. S. 300.

Adjustments and settlements between the assured and the insurance company, when fully performed, have all the elements and properties of a contract, and in the absence of fraud are as incapable of rescission as any other contract. Clement, Fire Ins. 50; *Mahew* v. *Ins. Co.*, 33 Mich. 105; May, Ins., 2nd ed. §53.

Where proofs of loss have been accepted, and the amount of loss agreed upon, the adjustment is final, and suit cannot then be maintained upon the policy merely because of an alleged error in the original proof of loss. *Montgomery* v. *Ricker,* 43 Vt. 165; *Saville* v. *Ins. Co.*, 3 L. R. A. 542; *Campbell* v. *Ins. Co.*, 10 Allen 213; *Platt, Assignee,* v. *Ins. Co.*, 62 Vt. 166.

POWERS, J. The plaintiff took out a fire insurance policy in the defendant company covering certain property in Dummerston, on the 13th day of July, 1902. During the life of the policy, the property was totally destroyed by fire. The next day the plaintiff gave the company's agent at Brattleboro

notice of the fire, and, with the assistance of the defendant's regular adjuster, who happened to be in the vicinity, made out on blanks furnished by the adjuster a sworn proof of loss in due form showing, among other things, four items of damage aggregating, according to the plaintiff's valuation, $500.37, to which was appended the following statement signed by the plaintiff: "It is hereby agreed that if the said company [defendant] allow the sum of $500.37 on this claim it shall be accepted by the undersigned as a full, final adjustment of the same. Payment to be made agreeable to the rules and regulations, and in accordance with the act of incorporation and by-laws of said company. The amount allowed to be cancelled from the policy." No question, controversy or dispute arose between the adjuster and the plaintiff as to the company's liability for the loss or the amount of damage suffered by the plaintiff as shown by the proof of loss, nor has the company since questioned its liability for that amount. On the 4th day of August, 1902, the defendant mailed to the plaintiff a notice that the directors had allowed the sum stated, enclosing a receipt in full for him to execute and return, and informing him that the company's check would be forwarded to him upon the return of such receipt properly executed, which notice was received by the plaintiff in due course of mail. It was claimed at the trial below by the defendant's counsel that this receipt was signed by the plaintiff and returned to the company, agreeably to such notice, and as this was not denied and was apparently treated by the court as a concession of fact, we so regard it, though no evidence concerning the receipt was received.

It was alleged in the defendant's notice of special matter filed with the general issue that on the 8th day of September, 1902, the defendant mailed to the plaintiff its check for the amount called for by the proof of loss, which the plaintiff claimed was never received by him; and that on the 17th day

of October, 1902, the defendant executed another check for the same amount and offered it to the plaintiff with interest from the date the loss became payable, which the plaintiff declined. Allusion was made to these checks by the defendant's counsel in the trial below, but the plaintiff's counsel expressly denied that the check was ever tendered to the plaintiff, and no proof was made concerning either of them, so we do not regard them as in the case.

On the 27th day of December, 1902, the plaintiff filed with the company an additional proof of loss purporting to cover articles of personal property not included in the original proof and omitted therefrom by mistake.

Payment of this loss became due according to the rules and charter of the company, October 14, 1902. This suit was brought January 17, 1903, and on August 6, 1903, a tender of the amount called for by the original proof of loss, with interest and costs to that date, was duly made by the defendant, and the same kept good as required by law.

On these facts, the trial court held the agreement of July 14, above recited, to be binding upon the plaintiff and ordered a verdict for the defendant to recover its costs accruing after the tender.

It is a familiar rule that an unexecuted accord is no bar to an action on the original undertaking. *Bryant* v. *Gale,* 5 Vt. 416; *Rising* v. *Cummings,* 47 Vt. 345; *Welch* v. *Miller,* 70 Vt. 108; *Gowing* v. *Thomas,* 67 N. H. 399. The agreement here relied upon is an accord executory, unless the plaintiff accepted the defendant's *promise* to pay (treating the notice of August 4 as such) in satisfaction of his claim. For, while the general rule is as just stated, that the accord must be executed in order to discharge the obligation, it is equally well settled that when the creditor accepts the mere promise of his debtor to perform some act in the future in satisfaction of the

debt, the mere promise itself, without performance, is sufficient to extinguish the debt. *Hard* v. *Burton,* 62 Vt. at p. 322; *Gowing* v. *Thomas, supra;* note to *Harrison* v. *Henderson,* (Kan.) 100 Am. St. Rep. at p. 438. To have this effect, however, the new promise must be one legally binding, operating to extinguish the existing claim, which can be enforced in substitution therefor. An essential element of such an agreement—like any other contract—is a legally sufficient consideration. But if one promises to do what he is already legally bound to do, the promise is nude; it creates no new duty and cannot support an action; nor does it afford a consideration for a promise by the other party. *Wheeler* v. *Wheeler,* 11 Vt. 60; *Cobb* v. *Cowdery,* 40 Vt. 25; see, also, *Chase* v. *Soule,* 76 Vt. at bottom of p. 357. Of this character is the agreement in question. As the matter stood at the time it was entered into, the defendant owed the plaintiff $500.37, the sum specified therein, payable in ninety days thereafter. So the plaintiff agreed to accept just what he was bound to accept, and the company agreed to pay just what it was bound to pay,—both at the time and in the manner specified in the original contract. Neither yielded anything; neither gained anything. The new agreement resulted in no advantage to the one or detriment to the other. It was not a compromise as was the case in *Insurance Co.* v. *Chestnut,* 50 Ill. 111, for there was no disagreement and hence there was nothing to compromise. *Insurance Co.* v. *Sweetser,* 116 Ind. 370.

The adjustment agreement was without consideration and revocable by either party to it at any time before full performance. It was a mere accord without satisfaction, and does not bar an action on the policy. *Vining* v. *Insurance Co.,* 89 Mo. App. 311; *Giboney* v. *Insurance Co.,* 48 Mo. App. 185. The question here decided was not considered in *Powers* v. *Insur-*

ance Co., 68 Vt. 390. That case was argued and determined without allusion to the validity of the partial adjustment.

Judgment reversed and cause remanded.

In Re David Comolli.

October Term, 1905.

Present: Rowell, C. J., Tyler, Munson, Watson, Haselton, and Powers, JJ.

Opinion filed February 2, 1906.

Habeas Corpus—Person "In Execution"—Right of Respondent to Bail Pending Hearing on Exception—V. S. 2027.

At common law, a person indicted or accused of any felony was bailable upon good surety, until he was convicted.

At common law, in all offences less than felony, the offender is bailable, unless judgment has been rendered against him, or bail is ousted by some special statute.

At common law, no court could bail a person in execution on a judgment following a conviction for any offence; for then imprisonment without bail is part of the sentence and punishment.

V. S. 2027, which provides that when a person is convicted of a bailable offence, and the case is passed to the Supreme Court, a judge of the county court may take bail for the appearance of the respondent before the Supreme Court, and discharge him from commitment, does not *entitle* the respondent to give bail in such cases, but merely authorizes the taking of bail in cases within its purview, if the court in its discretion sees fit to do so.

A person who is in the custody of a sheriff by virtue of an execution issued upon a judgment and sentence following his conviction of simple assault, is "in execution" within the meaning of the provision in our Constitution that "all persons, unless in execution," etc., shall be bailable.

On habeas corpus, it appeared that after conviction in county court of simple assault, judgment, and sentence of imprisonment thereon, the relator applied to said court to fix bail pending the hearing on his bill of exceptions, which had been duly signed and filed; that said court thereupon fixed such bail, and ordered that it be furnished before a specified time, which was after the final adjournment of said court, and in default thereof that mittimus issue; that bail not having been furnished within the time limited, mittimus issued, by virtue of which the relator was taken into custody by the sheriff of the county; that on the day following the issuing of the mittimus application was made to the presiding judge of said court to admit the relator to bail, which application was refused; that thereupon the relator brought habeas corpus, alleging that he was being restrained by said sheriff without authority. *Held*, that the relator was not unlawfully imprisoned, and that he be remanded to the custody of said sheriff.

HABEAS CORPUS, brought to the Supreme Court for the County of Washington at its October Term, 1905, and then heard. The opinion states the case.

John N. Harvey for the relator.

The respondent was not "in execution," and so was entitled to be bailed. Ex parte Lees. E. B. & E. 830; *King* v. *Waddington*, 1 East 159; 3 Salk 58; *The King* v. *Flower*, 8 T. R. 314; *Rex* v. *Brooks*, 2 T. R. 190; *Corbett* v. *State*, 24 Ga. 391; 2 Hawk. P. C. ch. 15, § 81; *King* v. *Marks*, 3 East 163; *Rex* v. *Reader*, 1 Stra. 531.

The court has power to grant bail till the prisoner is imprisoned. *Miller* v. *State*, 15 Fla. 575; *People* v. *Folmsbee*, 60 Barb. 480; Abbott's Law Dict. 461.

S. Hollister Jackson, State's Attorney, for the State.

After conviction no constitutional right to bail exists, for conviction establishes that proof of guilt is evident. 3 Enc. Pl. & Pr. 206; *Yates* v. *People*, 6 Johns. (N. Y.)

335; *People* v. *Lohman*, 2 Barb. (N. Y.) 450; *People* v. *Bowe*, 58 How. Pr. (N. Y. Sup. Ct.) 393; *People* v. *Restell*, 3 How. Pr. (N. Y. Sup. Ct.) 251; 1 Bish. Crim. Pro. §§ 252-254 and 362; Ex parte Dyson, 25 Miss. 356; Ex parte Wray, 30 Miss. 679; Ex parte Ezell, 40 Tex. 451; Hurd, Hab. Cor. 78-90-92; Hallam's Con. Hist. 140.

WATSON, J. At the September Term, 1905, of Washington County Court, the relator was convicted of simple assault, and was sentenced to imprisonment in the house of correction for the term of not less than four years nor more than four and one-half years from the date of commitment, to pay costs of prosecution, and to stand committed until sentence be complied with. Exceptions were taken by the relator and the same were duly drawn, allowed, signed, and filed. On October 14, the day of the final adjournment of the term, the relator applied to the court to fix his bail pending the hearing of the exceptions, whereupon it was ordered that if he furnish bail in the sum of two thousand dollars before nine o'clock in the forenoon of the 18th day of the same month, execution should be stayed, but if he failed so to furnish bail, mittimus should issue. Bail was not furnished within the time specified. A mittimus was thereupon issued, by virtue of which the relator was thenceforth held in custody by the sheriff of the county. On the day following the issuing of the mittimus, application was made to the presiding judge of that court to admit the relator to bail, which application was denied. The relator alleges that he is restrained illegally and without authority of law, and prays that he may be admitted to bail for his appearance before this Court where his case is pending on exceptions.

At common law a person accused or indicted of high treason, or of any felony whatsoever, was bailable upon good

surety until he was convicted. Glanville, 278-281; 1 Co. Inst. 189; 2 Hale P. C. 129. And it is laid down that regularly in all offences less than felony the offender is bailable, unless (1) he hath had judgment, or (2) that by some particular or special act of parliament bail is ousted. 2 Hale, P. C. 127. In 1 Chitty, Criminal Law, at page 93, it is said: "With respect to the cases in which bail is allowable, it is observable that at common law no justice, or indeed any court, could bail a person in execution on a judgment or conviction for any offence; for then such imprisonment without bail, is part of the sentence and punishment, and this is the existing law. Nor will a court between conviction and judgment, bail the offender without the consent of the prosecutor."

The same author says, page 98, that the Court of King's Bench or any judge thereof in vacation may in their discretion admit persons to bail in all cases whatsoever, and the only exception to their discretionary authority is where the commitment is for contempt, or in execution. In Bacon's Abridgement, Bouvier's ed. tit. Bail in Criminal Cases, it is laid down that neither the Court of the King's Bench nor any other court can bail persons in execution, or punished under any statute with imprisonment for their offence. And that this is one reason why they cannot interfere where a party is committed for contempt.

In *Rex* v. *Wilkes*, 4 Burr. 2527, the defendant was convicted of a criminal misdemeanor in two causes and judgment was duly assigned against him in each cause. Upon his non-appearance a judgment of outlawry was rendered against him. Later, he having surrendered himself to the sheriff upon a *capias utlagatum*, he was brought into court by the sheriff upon the return of a *habeas corpus* directed to him for that purpose. The return showed that the defendant was charged with two outlawries, one on each conviction for the respective

misdemeanors. Writs of error were allowed in the two causes of outlawry and the defendant was committed to the marshal. His counsel then moved that he might be admitted to bail, and arguments were made on that question. Mr. Justice Aston (p. 2541) said that after conviction there was no case where it had been held that the defendant had a *right* to be admitted to bail. Mr. Justice Willes said it was clear that the defendant had no *right* to demand being admitted to bail; that if it should be granted that he was entitled to be bailed upon the *outlawry,* yet as he stood convicted of the crime, he must be committed upon the conviction. And Lord Mansfield said that he knew of no case where a person convicted of a misdemeanor had been admitted to bail without the consent of the prosecutor.

The relator contends, however, that he is entitled to furnish bail by virtue of section 2027 of Vermont Statutes, which provides that when a person is convicted of a bailable offence in the county court and the case is passed to the Supreme Court, a judge of the county court may take recognizance to the State, with sufficient surety, for the personal appearance of such person before the Supreme Court, to answer for the prosecution, and thereupon direct his discharge from commitment.

It is contended on behalf of the State that this section leaves the matter of allowing bail in cases falling within its provisions, discretionary with the court. This statute was first enacted as No. 11, of the Acts of 1841. Adverting to the original act, the provision is that "either judge of the county court in which the trial was had shall have power to take recognizance to the treasurer of the State," etc. Manifestly the purpose of this statute was only to authorize the taking of bail in cases within its purview if the court in its discretion should grant it. The language used is not susceptible of a construc-

tion which makes it mandatory to admit to bail. The change in the wording was in the revision of 1880, but this effected no change in meaning.

The relator further contends that he is entitled to bail as a matter of right under chapter 2, section 33 of the Constitution, which upon the subject of bail reads: "All prisoners, unless in execution, or committed for capital offences, when the proof is evident or presumption great, shall be bailable by sufficient sureties; nor shall excessive bail be exacted for bailable offences." He argues that since he has not yet been committed to the house of correction, he is not *in execution*, hence is bailable. It is urged on the part of the State that the relator's custody in the hands of the sheriff on the mittimus is a custody *in execution*. Thus the question whether the relator is "in execution" is presented. The meaning of these words is nowhere defined in the Constitution and resort must be had to the common law to ascertain it. In *Rex* v. *Wilkes*, at page 2540, Mr. Justice Yates says: "In a criminal case, if the party be convicted, and a *capias ad satisfaciendum* issues, and he is taken upon it, he is in execution to make satisfaction." And in that case the defendant being in the custody of the marshal on the *capias utlagatum*, it was the opinion of the court, that he was in execution. See opinion of Lord Mansfield, page 2545, and of Yates, J., page 2546, and of Willes, J., 2548; also, Garnon's Case, R. 5 Co. 88. Serjeant Hawkins in speaking of where bail is grantable by the Court of King's Bench to one committed by an inferior court of record, among other things, says: "And as a great regard is always paid to the dignity of the court by which the party is committed, so is it likewise to the notoriety of the offence; and therefore where a person convicted of buying and selling old money, before justices of *oyer* and *terminer*, was committed in execution for the fine, by an order of the court not strictly formal, yet the Court

of King's Bench refused to bail him; for this reason chiefly, because he was in execution, and his commitment was defective only in point of form. Also where persons taken in execution for their fines to the King, set on them by a sessions of justices of peace, have not only brought their *habeas corpus,* but also their writ of error in the King's Bench, and assigned errors, yet the court has refused to bail them." 2 Hawk. P. C. ch. 15, sec. 77. The same distinction is made in civil cases. It is laid down in Blackstone, Book III, p. 415, that when a defendant is once in custody upon the writ of *capias ad satisfaciendum* he is to be kept in close and safe custody; and if he be afterwards seen at large, it is an escape, and the plaintiff may have an action against the sheriff for his whole debt. In *Benton* v. *Sutton,* 1 Bos. & Pul. 24, the action was against the sheriff "for the escape of a prisoner in execution." The prisoner was allowed to be at large before he was committed to jail. Held to be an escape, and Buller, J., referring to *Hawkins* v. *Plomer,* Black. 1048, said it was pretty well established that there might be an escape whether the party had been committed to jail or not.

Interpreting the Constitution in the light of the common law, there can be no doubt that when the relator was in the custody of the sheriff on the mittimus, he was in execution notwithstanding the final commitment had not been made.

It is adjudged that the relator is not unlawfully imprisoned, and he is remanded to the custody whence he was taken and his complaint is dismissed.

SAMUEL JOHNSON v. BOSTON & MAINE RAILROAD.

January Term, 1905.

Present: ROWELL, C. J., TYLER, START, WATSON, HASELTON, and POWERS, JJ.

Opinion filed February 2, 1906.

Master and Servant—Assumption of Risk—Defective Locomotive—Overhead Bridge—Fellow Servant.

A servant assumes not only the risks ordinarily incident to his employment, but also any unusual and extraordinary risks arising from the negligent performance of the master's duties, which the servant comprehends and chooses to encounter.

In an action by a freight brakeman against a railroad for injuries received by colliding with a dangerously low overhead bridge, while on top of a freight car and blinded and choked by unusual quantities of smoke and steam emitted from defendant's defective locomotive, evidence examined and *held* that, as plaintiff continued in the service of defendant after he knew all about the low bridge and the defective locomotive and comprehended the dangers arising therefrom, he thereby assumed those dangers as among the risks incident to his employment.

In an action by a freight brakeman against a railroad for injuries received by colliding with a dangerously low overhead bridge while on top of a freight car, the negligence of the fireman, who is not shown to be incompetent, in throwing coal into the furnace, while the train was on a down grade, thereby causing the locomotive to emit an unusual quantity of smoke which blinded plaintiff, was the negligence of a fellow-servant and cannot avail plaintiff.

Plaintiff testified that he thought he was struck by ice hanging from the bridge, and insisted that this alone was evidence sufficient to sustain a verdict in his favor. *Held*, that, as there is nothing in the record tending to show whether this opinion was well founded, nor anything tending to show that this condition was not usual and incident to his employment, it cannot avail plaintiff.

CASE for negligence. Plea, the general issue. Trial by jury at the December Term, 1903, Windsor County, *Munson*, J., presiding. Verdict ordered for the defendant, and judgment thereon. The plaintiff excepted. The opinion states the case.

R. E. Stevens, and *Frank Plumley* for the plaintiff.

Defendant was negligent in allowing the locomotive to be out of repair. *Carbine* v. *R. R. Co.*, 61 Vt. 351; *Bancroft* v. *R. R. Co.*, 67 N. H. 466; *Demars* v. *Glen Mfg. Co.*, 67 N. H. 406; *Shaw* v. *Sheldon*, 103 N. Y. 667; *Anderson* v. *Clark*, 155 Mass. 368.

Hunton & Stickney for the defendant.

A servant assumes all ordinary risks incident to his employment, and all risks which exist because of the master's negligence and which the servant knows, apprehends, and chooses to encounter. *Gibson* v. *Erie Ry. Co.*, 63 N. Y. 449; *DeForest* v. *Jewett*, 88 N. Y. 264; *Buzzell* v. *Laconia Mfg. Co.*, 48 Me. 113; *Baylor* v. *R. R. Co.*, 30 N. J. (Law) 23; *B. & O. R. R. Co.* v. *Stricker*, 51 Md. 47; *Devitt* v. *Pacific R. R. Co.*, 50 Mo. 302; *Smith* v. *Ry. Co.*, 69 Mo. 62; *Caguey* v. *R. R. Co.*, 69 Mo. 416; *Ladd* v. *New Bedford R. R. Co.*, 119 Mass. 412; *Burnham* v. *R. R.*, 68 N. H. 567; *Young* v. *R. R.*, 69 N. H. 356; *Hardy* v. *Railroad*, 68 N. H. 523; *Allen* v. *Railroad*, 69 N. H. 271; *Deschenes* v. *Railroad*, 69 N. H. 285.

POWERS, J. The plaintiff seeks damages for injuries sustained in the defendant's service at Lebanon, N. H., on January 2, 1902. At that time he was, and for more than eleven years prior thereto had been, employed by the defendant as a

freight brakeman running usually between Concord, N. H., and White River Junction, Vt. During all that time there had been maintained at Lebanon an overhead bridge spanning the defendant's track, so low as to endanger one passing under it on the top of a freight car and compel him either to descend between the cars or lie flat upon the car to escape its perils. On the day named, the plaintiff's train reached Lebanon between eight and nine o'clock in the evening. It was a moonlight night, and freezing. From Lebanon toward White River Junction the defendant's road is descending, and agreeably to the defendant's rule, the plaintiff was at his post on top of the fourth car from the engine as the train left the station at Lebanon and approached this dangerous bridge. The plaintiff knew all about the bridge and its dangers, and being then mindful of its perils, in conformity with a custom which he had observed during the entire period of his employment on the road, as the train approached the bridge, he lay face-downward prone upon the car that he might pass under in safety. He was surrounded with a cloud of smoke and steam so dense as to completely envelop him and cut off his view of objects about him, and being choked by the smoke, steam and gas from the engine, he raised his head to catch breath, and came into violent contact with the bridge itself or the ice depending therefrom, and was severely injured. A verdict was directed for the defendant in the court below, and to that direction the plaintiff excepted.

This accident happened in New Hampshire, but we need not pause to consider whether we are to apply the law of that State or our own; for, upon the questions raised by this record, their decisions are in entire accord with ours. The law of the case is found in the rule, variously stated in the different cases, but so far as applicable here, amounting to this: The servant assumes not only the risks ordinarily incident to his

employment, but such unusual and extraordinary risks as he knows and comprehends. *Carpenter's Admr.* v. *Railroad Co.*, 73 Vt. 336; *Morrisette v. Railroad Co.*, 74 Vt. 232; *Kilpatrick* v. *Railroad Co.*, 74 Vt. 288; *Leazott* v. *Railroad,* (N. H.) 45 Atl. 1084; *Burnham* v. *Railroad,* (N. H.) 44 Atl. 750. So it is that a servant, when in the course of his employment, a special and obvious risk is presented to him,—one not ordinarily incident to the business,—may, as a rule, decline to accept it; but if he choose to encounter it, he assumes it. And this is so though the risk arises from the negligent performance of the master's duties. *Talbot* v. *Sims,* (Pa.) 62 Atl. 107; *Furnace Co.* v. *Abend,* 107 Ill. 44. This case, then, so far as the dangers arising from the low bridge are concerned, comes within the decisions in *Carbine's Admr.* v. *Railroad,* 61 Vt. 348; *Allen* v. *Railroad,* 69 N. H. 271, and many such cases. For the plaintiff knew all about the bridge and the dangers arising from it, and by continuing in the services had assumed these as among those incident to his employment.

Indeed, this proposition is not seriously questioned; but the plaintiff insists that he was at the time of the accident subjected to an unusual and extraordinary hazard, in that the engine hauling this train was defective, and leaked steam in extraordinary volume; that this was a condition which ought not to have existed, and would not have existed but for the negligence of the defendant, and consequently was not a danger assumed by him; and that this condition was a proximate cause of the injury, and affords a legal basis for a recovery. And so it does, unless, as we have seen, the condition and its dangers were known to and voluntarily incurred by him.

That the condition of this locomotive was as plaintiff claims, and that such condition resulted from the negligence of the defendant, is not denied. But the record shows that its condition had been the same in respect to leaking steam in

unusual quantities all the way from Concord. Not only that, but it appears that the engines generally on the defendant's road were in bad condition in the respect indicated at the time of this accident. All this was known by the plaintiff. The risk of being blinded and choked by the usual volume of smoke and steam necessarily emitted from the locomotive while passing under the low bridge was one of the ordinary hazards of the service. *Hardy* v. *Railroad*, 68 N. H. 536. The increased danger arising from an engine leaking unusual quantities of steam was as obvious to the plaintiff as to the defendant; and it must be held that the plaintiff, by continuing in the service with full knowledge, assumed the increased hazard—that of passing under a dangerously low bridge while enveloped in an unusual cloud of steam emitted from a leaky engine.

It is further insisted by the plaintiff that there was evidence in the case tending to show that the plaintiff was struck by the ice depending from the bridge, and that this affords evidence of the defendant's negligence sufficient to sustain a recovery. The only evidence on this subject was the statement of the plaintiff to the effect that he thought that he was struck by the ice on the bridge, and there is nothing in the record to show whether this opinion was well founded or otherwise. Nor is there anything in the record tending to show that the condition in this respect at the time of the accident was unusual. For aught that appears it was usual for ice to form on the bridge as it had that night. It was encumbent on the plaintiff to show this—to show an unusual condition—for the ordinary condition in this respect was, like the others, covered by his assumption of risk.

Nor would the negligence of the fireman, if any, in throwing into the furnace fresh coal on a down grade while the brakemen had to be on top of the cars, contrary to the custom of the firemen, thereby causing a dense volume of smoke and

gas to be emitted, avail the plaintiff. For this would be the negligence of a fellow servant, not shown to have been incompetent, which could not form the basis of a recovery.

Judgment affirmed.

RAY H. MIXER, BY NEXT FRIEND, *v.* J. NEWTON HERRICK ET AL.

October Term, 1905.

Present: ROWELL, C. J., TYLER, MUNSON, WATSON, and HASELTON, JJ.

Opinion filed February 2, 1906.

Negligence—Public Nuisance—Injuries Resulting from a Positive Wrong—Pleading—Demurrer.

There is a distinction between an action for injuries suffered by reason of a positive wrong committed by some other person, and an action for injuries sustained by reason of such person's negligence. In the former instance, no question of defendant's negligence can arise; in the latter, negligence must be directly proved.

Any unauthorized obstruction or excavation in a public street, impairing its safety, constitutes a public nuisance, and subjects the person creating or maintaining it not only to an indictment, but also to liability in a civil action by any person who, without fault on his part, suffers special injury therefrom; and in such action, no question of defendant's negligence can arise, since the initial act was wrongful.

But when an obstruction or excavation is made with the consent of municipal authorities having power to grant it, the rule of liability is less severe, and rests upon the ordinary principles of negligence.

Buchanan v. *Town of Barre*, 66 Vt. 129, distinguished.

A demurrer to a declaration containing one good count should be overruled.

Assuming, but not deciding, that, in an action for injuries resulting from defendants' alleged negligence in allowing a hole in the sidewalk in front of their building, and used by them in connection therewith, to be insufficiently and defectively covered, the declaration should show that the defendants had knowledge of the alleged defects, since it appears from certain allegations in the declaration that defendants must have had that knowledge, an express averment thereof is unnecessary.

CASE for negligence. Heard on demurrer to the declaration at the April Term, 1905, Windham County, *Powers,* J., presiding. Demurrer overruled, declaration adjudged sufficient. Defendant excepted.

F. D. E. Stowe, and *Waterman & Martin* for the defendant.

The declaration is defective in not alleging that defendants had notice of the condition complained of. *Osier* v. *Hinesbury,* 44 Vt. 220.

Frank E. Barber for the plaintiff.

WATSON, J. This case is here on demurrer to the declaration which is in two counts. The declaration is based upon the negligence of the defendants in permitting the hole in the sidewalk in front of their block and used by them in connection with it on the easterly line of Main Street in the East Village of Brattleboro, to be and continue to be insufficiently and defectively covered. It contains no allegation that the existence of the hole was unlawful, or that it constituted an unauthorized obstruction of the sidewalk and hence a wrong or a nuisance. There is a distinction between an action for injuries suffered by reason of a positive wrong committed by some other person, and an action for injuries sustained by reason of such person's negligence, and this is of the latter kind.

Dickinson v. *Mayor, etc.* 92 N. Y. 584; *Clifford* v. *Dam,* 81 N. Y. 52.

The general rule is that any unauthorized obstruction or excavation in a public street, impairing its safety, constitutes a public nuisance, and subjects the person creating or maintaining it not only to indictment but also to liability in a civil action by any person who, without fault on his part, suffers special injury therefrom, and no question of negligence on the part of the wrongdoer can arise, his act being wrongful. But when an obstruction or excavation is made with the consent of municipal authorities having power to grant it, as we assume it was in this case, the rule of liability is less severe and rests upon the ordinary principles of negligence. Dill. Mun. Corp. §§ 699, 700, 1032; *Baggage* v. *Powers,* 130 N. Y. 281; *Jorgensen* v. *Squires,* 144 N. Y. 280; *Calder* v. *Smalley,* 66 Iowa 219. Whether by neglect the obstruction or excavation made with such consent may become a nuisance there is no occasion to inquire.

The case of *Buchanan* v. *Town of Barre,* 61 Vt. 129, relied upon by the defendant, is not in conflict with this doctrine. There the plaintiff sought to recover for injuries received by slipping and falling on the sidewalk in the village of Barre, in consequence of its slippery condition, at a point two to four feet from the steps of the town hall or opera house, when going there to attend an entertainment given by an opera company. It was held that the plaintiff could not recover, since (1) there was no statutory liability on the part of the town or village; and (2) there was no liability consequent on the fact that the defendant owned the opera house and rented it on the occasion in question to the opera company, receiving rent therefor; for considered as a private individual, the defendant had no control of the sidewalk which was a part of the public street,

owed no duty to the plaintiff in respect to its condition, and consequently was under no liability for its defects.

It is urged that the declaration contains no allegation that the defendants had notice or knowledge of the defect complained of, which it is argued is necessary to render them liable in this action. Assuming, but not deciding, that it must appear from the declaration that the defendants did have such notice or knowledge, yet the second count is sufficient. It is there alleged that the defendants, at the time in question and for a long time prior thereto, owned, possessed, and occupied the premises and building described therein, and that there was and had been for a long time prior thereto, a certain hole in the sidewalk, etc., the same being used by the defendants, their agents and tenants as a means of entering the basement of said building with merchandise and other articles of personal property. It is averred that the hole was three feet by three feet and about four feet deep; that it then was and for a long time had been covered by an iron grate, when not in use by the defendants, their agents, or tenants for the purposes aforesaid. The alleged negligence of the defendants consisted in their failure to keep the hole safely protected and securely covered, in that the iron pins on which the grate rested were so short, and the grate was so small, that the latter would slide and slip from the iron pins and fall into the hole. This defect, if it existed, was patent, and we think the allegations of the defendants' occupancy of the premises and of their use of the hole sufficiently show that they had notice of the condition of the grate and of the pins which supported it.

It thus appearing that the defendants had such notice, an express averment thereof was unnecessary. Gould's Pl. ch. III. sec. 3. The second count shows a cause of action and is sufficient.

Since the demurrer is to the declaration, and one count is sufficient, the demurrer must be overruled.

Judgment affirmed and cause remanded.

HERBERT N. JEWETT *v.* MURRY BUCK.

October Term, 1905.

Present: ROWELL, C. J., MUNSON, WATSON, HASELTON, and POWERS, JJ.

Opinion filed February 2, 1906.

Deceit in Sale of Land—Evidence—Declarations—Explanation in Rebuttal.

In an action for deceit in the sale of a farm by falsely representing that it included a certain adjacent nineteen-acre piece of wood land which defendant did not own, it was error to allow plaintiff to testify that defendant, referring to the whole farm and not to said wood land alone, told him that there were a thousand cedar posts on the land, a lot of maples, a few birches, and some soft wood.

Plaintiff was allowed to testify that, when defendant was urging him to purchase the farm, he told him that he did not desire to do so because he owned a nice little place in Stannard, was constable, tax-collector, and lister, and that his business brought him in "quite a little," that he thought it wasn't best to trade, that he better stay where he was. *Held*, that, although this testimony was wholly immaterial to any issue on trial, since the declaration contains no allegation of special damages, still its admission was error, as its very nature made it prejudical to defendant.

Since defendant testified, on direct-examination, as to what he told R. about having been on the nineteen-acre piece and as to his knowledge of the amount of timber on the farm, it was not error to allow him to be cross-examined as to what he told R. on that subject in a conversation which, for aught that appears from the record, may have been a part of, and in connection with, the conversation referred to on direct examination.

Testimony of plaintiff's witness, as to what defendant told him relative to the quantity and value of the wood and lumber on the farm in question: "He said to me that there was, it was represented to him, twenty thousand cedar posts in the swamp, and something like two hundred thousand feet of lumber," does not tend to show that defendant had knowledge of the wood and lumber on the farm, and its admission for that purpose was error.

Defendant's grantor having testified in behalf of defendant that, on the day the deed to plaintiff was made, the parties had a certain conversation with him about said nineteen-acre piece which he had sold off during his ownership of the farm, and that they then got from him copies of deeds to him of the farm, it was proper to allow plaintiff to testify in rebuttal that he had said conversation at a later time, and that he then procured said witness to sign a writing in respect of the nineteen-acre piece, and that plaintiff sent this writing to the State's Attorney, and had not seen it since.

In an action on the case for deceit in the sale of a farm, alleged to contain only 381 acres, by falsely representing that it contained 400 acres, evidence examined and *held* that it tended to show that the land conveyed to plaintiff contained fewer than 400 acres.

CASE for deceit in the sale of land. Plea, the general issue. Trial by jury at the December Term, 1904, Caledonia County, *Tyler*, J., presiding. Verdict and judgment for the plaintiff. The defendant excepted.

The declaration alleged that defendant, well knowing that his farm contained only 381 acres, and did not include a certain adjacent nineteen-acre piece of wood land, which he did not own, by falsely representing to plaintiff that the farm contained 400 acres and included said nineteen-acre piece, deceived the plaintiff and thereby induced him to purchase the farm, whereby "the plaintiff has lost and been deprived of divers great gains, profits, and advantages which he might and otherwise would have derived from the purchase of both said pieces of land; that he has wholly lost and been deprived of said nineteen acres of land; that if defendant had owned and conveyed to plaintiff said nineteen acres of land, plaintiff could

have cut, hauled to market, and sold the wood and timber thereon standing, and thereby would have employed his time, and made divers gains and profits, to wit, the sum of one thousand dollars."

Dunnett & Slack for the defendant.

Harland B. Howe, and *Herbert W. Hovey* for the plaintiff.

WATSON, J. This is an action for deceit in the sale of land. Subject to defendant's exception on the ground that the testimony was not admissible under the declaration, the plaintiff was permitted to testify that he and the defendant went over the land which the defendant proposed to sell and afterwards did sell to him, upon an occasion some days before the making of the deed, and that on that occasion the defendant had some talk with the plaintiff as to how the plaintiff could pay for the farm and said to him that there were a thousand cedar posts on said land, a lot of maples, a few birches, and some soft wood. The admission of this evidence was error. It did not support any allegation in any count in the declaration; nor did it bear on the question of damages, since the exceptions show this declaration to have been made with reference to the whole land which the defendant afterwards sold to the plaintiff, and not to that part thereof which defendant did not own and to which he did not convey good title, by reason whereof the plaintiff suffered damage.

The plaintiff was further allowed to testify, subject to exception, that in the conversation he assigned to the defendant as a reason why he did not desire to purchase the farm when urged to do so, that he owned a nice little place in Stannard, that he was constable, tax-collector, and lister, and that this business brought him in "quite a little," and that he

thought it wasn't best to trade,—that he better stay where he was. The declaration contains no allegation for special damages or otherwise which made this testimony proper, and although it was immaterial to any issue on trial its very nature made it prejudicial to the defendant.

The defendant testified in his own behalf in direct examination that he had never been on the nineteen-acre piece, that he did not know anything about the quantity of wood and lumber on the farm except what Mr. Hovey, from whom he purchased it, told him, and that he understood there were from one hundred to one hundred fifty thousand feet of spruce on it and ten thousand cedar posts, and that he told this to the plaintiff and told the same thing to Rev. Mr. Ross. On cross-examination the plaintiff was allowed, against the defendant's objection and exception, to ask the defendant if he didn't tell Ross at Greensboro Bend hotel that there was lumber enough on the farm to pay for it, to which the defendant answered that he might have said so in common conversation. The defendant further testified under the same exception that he thought he had a talk with Ross concerning the farm at the hotel named, but that he didn't then tell him there was wood and lumber enough on the farm to pay for it.

For aught that appears from the exceptions the declaration made by the defendant to Ross at the hotel, as drawn out in cross-examination, may have been in connection with and a part of the same declaration referred to by the defendant in his examination in chief as having been made by him to Ross, which presumably was proper evidence. If it was in connection with and a part of it, the cross-examination cannot be said to be error; for inasmuch as the defendant testified in his examination in chief that he so told Ross, he cannot be heard to complain if he is cross-examined regarding it. *State* v. *Flint*, 60 Vt. 304.

In rebuttal the plaintiff called Ross as a witness and, subject to defendant's objection and exception, asked him what the defendant said to him if anything as to the quantity and value of the wood and lumber on the defendant's land which he had shown the witness. We think it fairly appears from the exceptions that this question to the witness had reference to some occasion when he went with the defendant onto the land subsequently sold by defendant to the plaintiff. The witness answered; "He said to me that there was, it was represented to him, twenty thousand cedar posts in the swamp and something like two hundred thousand feet of lumber. Now maybe I have not worded it just as he worded it to me." This evidence was admitted as tending to show that the defendant had some knowledge of the wood and lumber on the farm. But it had no such tendency, and the exception must be sustained. The only reasonable construction which can be given to the evidence is that the defendant was undertaking to state only what had been represented to him, and not his own knowledge.

A Mr. Hovey who formerly owned the farm which the defendant sold the plaintiff, and who at the time of the sale by the defendant to the plaintiff lived in Morrisville, was called as a witness by the defendant to certain conversations which occurred on the day when the deed was made, and he testified, among other things, to the fact that the parties came to his place and got copies of deeds to him of the farm in question, and that they had conversation about the nineteen-acre piece which he had sold off during his ownership of the farm. In rebuttal the plaintiff was allowed to testify in his own behalf that he went to Hovey's at a later time and had the conversation with him about the nineteen acres as testified to by Hovey, and that at that time he got Hovey to sign a writing with respect to the nineteen-acre piece, and that the plaintiff sent

the writing so signed to the State's Attorney of Caledonia County and had not seen it since. This testimony was admitted, against the objection and exception of the defendant, as tending to show that Hovey was mistaken as to when the conversation as to the nineteen acres took place, and to show that it was after the defendant sold and deeded the farm to plaintiff, instead of at the time of sale as claimed by Hovey. We think the tendency of this evidence was as it was offered and that there was no error in its reception.

The description in the deed from the defendant to the plaintiff was as follows:

"Being all and the same land and premises deeded to me, the said Murry Buck, by J. L. Hovey and wife by their deed of warranty, lying and being in the town of Wheelock, in the County of Caledonia and State of Vermont, being four hundred acres (400) with the buildings thereon standing, described as follows: Being one hundred forty-four (144) acres, more or less, deeded to J. L. Hovey and Ella A. Hovey by the deed of H. E. Hovey, dated December 17, 1891; also two hundred (200) acres more or less deeded to J. L. Hovey by Bell C. and Filo B. Graves, by their deed of warranty, dated April 1, 1896, being lots 98 and 99 in the original allotment of said town; also six (6) acres taken off from lot 83 in said town; also forty-five (45) acres of land more or less on lots numbered 68 and 69, with the buildings thereon, which was deeded J. L. Hovey by Paul S. Davis by his deed of warranty dated the 4th day of March, 1899, and recorded in Book 18, page 56 of the Land Records of said town of Wheelock. Reference to the above named deed and the records thereof, and all deeds conveying the above described land and records thereof, therein referred to, is had for a more full and complete description of said land and premises. Meaning to convey by this deed all and the same land and premises conveyed to me

the said Murry Buck, with the buildings thereon standing, by J. L. Hovey and wife by their deed of warranty dated on or about the 22nd day of September, 1902, being four hundred acres of land with the buildings thereon standing, be the same more or less."

The conveyances to Hovey gave the acreage of lots 98 and 99 at about two hundred acres of land, and the defendant's evidence tended to show that these lots were laid out one hundred sixty rods long and one hundred rods wide. The acreage mentioned in the other conveyances to the said Hovey, together with that given of lots 98 and 99, made in all four hundred acres prior to the sale of the nineteen acres by him. Hovey testified to a measurement of lots 98 and 99 while he was in possession of the farm, showing that the lots were one hundred eighty rods long and overran somewhat in width, so that after the conveyance of the nineteen acres, the land in these two lots exceeded the quantity mentioned in the deed. This testimony of Hovey was the only testimony in the case as to the real quantity of land in those two lots, except the deed from the defendant to the plaintiff which gave it as two hundred acres, and the plaintiff did not claim any shortage of land from the amount conveyed to him, except this nineteen-acre piece which had been sold from those two lots before Buck took his deed. The defendant claimed there could be no recovery under the evidence on the counts which merely counted on a shortage of land from the quantity mentioned in the deed, namely counts which stood on the proposition that the defendant well knowing the piece of land to contain less than four hundred acres, to wit, three hundred and eighty-one acres, and represented to the plaintiff that it contained four hundred acres, because there was no evidence showing but that there were in fact four hundred acres, and the defendant requested the court to charge this in substance. To the refusal of this re-

quest the defendant excepted. The exceptions state that there was no testimony in the case as to the quantity of land "except as above stated," which we construe to mean except as before stated in the exceptions. It cannot be said that there was no evidence tending to show that there were not four hundred acres exclusive of the nineteen-acre piece; for in the second paragraph of the exceptions it appears that testimony was given tending to show that when the parties were considering the question of making the contract, and before the deed was given, the defendant told the plaintiff that he, defendant, had four hundred acres including said nineteen acres. Hence the request was properly refused.

Other exceptions were saved in this case, but the same questions are not likely to arise on another trial so they are not considered.

Judgment reversed and cause remanded.

SERENA K. CHURCH'S EXECUTOR *v.* WHITCOMB H. CHURCH'S ESTATE.

October Term, 1905.

Present: ROWELL, C. J., TYLER, MUNSON, WATSON, and POWERS, JJ.

Opinion filed February 2, 1906.

Debts Due a Decedent—Situs—Foreign Executor—Right to Maintain Suit in this State.

Debts due a decedent have their *situs* in the state where the debtor resides, and must be administered there.

If no part of a decedent's estate has its *situs* in this State, and so no administration thereof can be had here, the decedent's foreign

executor may maintain a suit in this State to collect a debt due the decedent's estate.

Declaration in assumpsit by a foreign executor in an appeal by him from the disallowance by commissioners on a decedent's estate of a claim presented by said executor. The executor demurred to the estate's plea in bar which alleged only that the executor's testate died in New Hampshire, that the executor was appointed by a probate court in that State, and that letters testamentary on his testate's estate had never been granted to him in this State. *Held*, that the plea is bad in not showing where the testate resided at the time of his death and at the time of said decedent's death; for, if the testate resided in New Hampshire at the time of said decedent's death, and continued to reside there till her own death, her foreign executor can maintain a suit in this State against said decedent's estate.

Whitcomb H. Church and Serena K. Church, his wife, were residents of Lebanon, N. H. Serena died testate, and Whitcomb H. subsequently deceased, leaving an estate in Vermont which is being settled in the Probate Court within and for the district of Hartford in this State. This case is an appeal from the disallowance by the commissioners in said Probate Court of claims presented against the estate of said Whitcomb H. Church by Wm. P. Burton, as executor of the last will and testament of said Serena K. Church. Appellant's declaration is in assumpsit, and counts upon certain promissory notes signed by said Whitcomb H., payable to one Daniel Knight, or order, and by him transferred to said Serena K.

The plea alleged only that said Wm. P. Burton derived his authority as executor of the will of Serena K. Church solely by virtue of the decree of a probate court in Grafton County in the State of New Hampshire, and that he had never been appointed such executor by any court in the State of Vermont. Heard on demurrer to said plea at the June Term, 1905, Windsor County, *Haselton*, J., presiding. Demurrer

overruled, and plea adjudged sufficient. The appellant excepted.

Pingree & Pingree for the plaintiff.

A debt due a decedent has its *situs* at the place where the debtor resides at the time of decedent's death. *Hillard* v. *Cox,* Raymond's Rep. 562; *Griffin* v. *Griffin,* Dyer's Rep. 83; *Widow Yoemans* v. *Bradshaw,* Carthew's Rep. 373; *Re Joslyn's Est.,* 76 Vt. 88; *People* v. *Whitehead,* 49 Vt. 187; *Walton* v. *Hall,* 66 Vt. 455.

William Batchelder for the defendant.

"Letters testamentary granted to an executor in his own state or country have no ex-territorial force. An administrator has no authority beyond the limits of the state or country in which he was appointed. In either case one must be confirmed by the court of the state or country in which property is situated, or debts are owing before he can effectually administer the property or collect the debts there." Sch. Ex. & Admr. §§ 15, 164, 172, 173; *Vaughn, Admr.* v. *Barrett,* 5 Vt. 333; *Langdon* v. *Potter,* 11 Mass. 313; Woerner, Admin. §§ 157, 160.

WATSON, J. This case is here on demurrer to the appellee's plea in bar. It appears from the plea that Serena K. Church died testate in the State of New Hampshire, that her last will and testament was there probated and W. P. Burton, the appellant, appointed executor thereof, and that letters testamentary on her estate have never been granted to the appellant in this State. There is nothing in the plea showing where Whitcomb H. Church resided at the time of Serena's death nor at the time of his own death. The plea is deficient in this

respect. For if he resided in the State of New Hampshire at the time of her death and continued to reside there until his own death, the *situs* of the debt in question was there also, and it could be no basis for the administration of her estate here. V. S. 2326-2327; *Abbott* v. *Coburn,* 28 Vt. 663; *Walton* v. *Hall's Estate,* 66 Vt. 455; *In Re Joslyn's Estate,* 76 Vt. 88.

If no part of her estate had its *situs* in this State, no administration can be had here, and her foreign executor can prosecute the suit against the estate of Whitcomb H. Church for the collection of the debt in question. This question in principle is fully discussed in *Purple* v. *Whithed,* 49 Vt. 187, and we see no reason for disagreeing with the conclusion there reached. But on the other hand, if at the time of Serena's death Whitcomb H. resided in this State the debt from him to her had its *situs* here, and it was a part of her estate to be administered here. In that event the foreign executor would have no standing to prosecute the claim against Whitcomb H.'s estate in this jurisdiction. This clearly appears from the authorities before cited.

It is contended by the appellant that the question here involved cannot properly be raised by a plea in bar,—that it must be by a plea in abatement. But whether this is so or not we do not decide.

Judgment reversed, demurrer sustained, plea adjudged insufficient, and cause remanded.

STATE *v.* JAMES DUNCAN ET AL.

October Term, 1905.

Present: ROWELL, C. J., TYLER, WATSON, HASELTON, and POWERS, JJ.

Opinion filed February 2, 1906.

Criminal Law—Conspiracy—Sufficiency of Indictment—Respondent's Testimony Before Grand Jury—Self-Criminating Evidence—Nature of Privilege—Waiver—Effect on Indictment.

When a witness has the personal privilege to testify or not as he chooses, and he testifies without objection, he will be deemed to have done so voluntarily.

The common law immunity guaranteed by that provision of our Constitution which declares that no one can be compelled to give criminating evidence against himself is an option of refusal, and not a prohibition of inquiry; it is a personal privilege which may be waived, and which is waived if not seasonably asserted.

This privilege is the witness's, and he alone must claim it.

Nor is it requisite, in order to constitute a waiver of this privilege, that the witness be notified thereof, and warned of the possible consequence if he gives testimony criminating himself; though such notice and warning are usually given.

Where at the time a person comes before a grand jury as a witness, in obedience to a subpoena duly served upon him, he is neither under arrest for, nor charged with, any crime, he stands as a mere witness, and his testimony, given without objection on his part, is properly received and considered by the grand jury, although it tends to criminate him; and said grand jury may subsequently, on the strength of such testimony, legally indict him of the crime concerning which he so testified.

The law is different where a person is under arrest for, or charged with, the crime about which he is examined, and for which he is afterwards indicted; in such case he stands as a party, and not as a witness.

A plea in abatement of an indictment for conspiracy, which alleges that while said indictment and the charges of conspiracy therein contained were pending before the grand jury, and while the grand

jury were investigating and inquiring into said charges, the respondent was summoned before the grand jury and was required and compelled to give testimony touching said indictment and charges and was fully interrogated as to them, and was then and there obliged and compelled to make, and then and there did make, answer thereto on his oath, is bad on demurrer, in not alleging that respondent asserted his privilege and objected to giving criminating evidence against himself; for until such assertion, there could be no compulsion; the alleged compulsion is a mere conclusion, whereas facts and not conclusions, should have been alleged.

The further allegations of said plea, that respondent did not know what was going on before the grand jury, and was not advised of his privilege in respect of giving criminating evidence against himself, are immaterial; for it is not shown that at the time he so testified it had been ascertained that a crime had been committed, or that he was in custody charged with a crime, or even suspected thereof.

Nor is the allegation that he was "wholly ignorant" of his rights in respect of his privilege, material, for ignorance of the law excuses no one.

An indictment against ten persons for conspiracy "to prevent, hinder, and deter" the several persons therein named, "by violence, threats, and intimidation from engaging and continuing in the business of manufacturing granite," charges a conspiracy to do an act unlawful at common law, and therefore is sufficient.

INDICTMENT against ten persons for conspiracy. Five of the respondents were summoned before the grand jury and gave self-criminating evidence under oath, and they severally pleaded that in abatement. The other five respondents jointly pleaded that in abatement, though they themselves were not called before the grand jury. Heard on demurrer to said pleas in abatement at the June Term, 1905, Caledonia County, *Munson*, J., presiding. Demurrers sustained, *pro forma*, and pleas adjudged insufficient, to which the respondents excepted. Whereupon respondents severally demurred to the indictment.

Demurrers overruled, *pro forma,* and indictment adjudged sufficient, to which the respondents excepted.

The indictment alleges that certain persons therein named were engaged at Hardwick, etc., in the business of manufacturing granite, and thereby gaining a livelihood; that the respondents at, etc., "with divers other evil disposed persons to the grand jurors unknown, did then and there unlawfully combine, conspire, confederate, and agree together to prevent, hinder, and deter by violence and threats and intimidation the said" manufacturers of granite "from further engaging and continuing in the business of manufacturing granite, to the great damage of said" manufacturers, "and to the evil example of all men, and against the peace," etc.

Senter & Senter, Taylor & Dutton, M. G. Morse, and *Harland B. Howe* for the respondents.

The proceedings disclosed in the pleas in abatement are in direct violation of the tenth article of our Constitution, "Nor can he be compelled to give evidence against himself." *U. S.* v. *Edgerton,* 80 Fed. 374; *Boyd* v. *U. S.,* 116 U. S. 617; *Boone* v. *People,* 148 Ill. 440; *Entrick* v. *Carrington,* 19 Howell's St. Tr. 1029; *Cullum* v. *Com.,* 24 Grath, 624; *Temple* v. *Com.,* 75 Va. 892.

An indictment founded upon evidence brought forth by means so palpably in violation of the Constitution should be quashed. *State* v. *Frosiseth,* 16 Minn. 297; *Counselman* v. *Hitchcock,* 142 U. S. 547; *Boone* v. *People,* 148 Ill. 448; *People* v. *Singer,* 5 N. Y. Crim. Rep. 1; *People* v. *Haines,* 6 N. Y. Crim. Rep. 100; *U. S.* v. *Edgerton,* 80 Fed. 374; *People* v. *Moore,* 65 Howard's Pr. 186; *State* v. *Horton,* 63 N. C. 595; *Cullen* v. *Com.,* 24 Gratt. 624; *Temple* v. *Com.,* 75 Va. 892; *Boyd* v. *U. S.,* 116 U. S. 616; *State* v. *Clifford,*

86 Iowa 550; *Corley* v. *State,* 50 Ark. 305; *People* v. *Sellick,* 4 N. Y. Crim. Rep. 329; *People* v. *Sharp,* 107 N. Y. 436; *People* v. *Lauder,* 82 Mich. 109; Rapalje on Proc. § 77; Thompson and Merriman on Juries, § 643.

Nor can it be contended that a party testifying under oath before a grand jury is a voluntary witness. *People* v. *McMahon,* 15 N. Y. 395; *People* v. *Mondon,* 103 N. Y. 211, 18 N. E. 496.

The demurrer to the indictment should have been sustained. "When the criminality of a conspiracy consists of an unlawful agreement by two or more to compass or promote some criminal or illegal purpose, that purpose must be fully and clearly stated in the indictment." *Com.* v. *Hunt,* 4 Met. 111, 38 Am. Dec. 346; *State* v. *Crowley,* 41 Wis. 271; *U. S.* v. *Cruikshank,* 92 U. S. 542; *State* v. *Stewart et al.,* 59 Vt. 292; *State* v. *Hewitt,* 31 Me. 398; *State* v. *Roberts,* 34 Me. 320; *Lambert* v. *The People,* 9 Iowa 578; *Com.* v. *Eastman et al.,* 1 Cush. 225; *Com.* v. *Shedd,* 7 Cush. 514; *Alderman* v. *People,* 4 Mich. 414, 69 Am. Dec. 321; *State* v. *Parker,* 43 N. H. 88; *Cole* v. *The People,* 84 Ill. 219; *People* v. *Bartlow,* 37 Mich. 456; *State* v. *Jones,* 13 Iowa 269; *State* v. *Potter,* 28 Iowa 557; *People ex rel. Lawrence* v. *Brady,* 56 N. Y. 182.

Frank D. Thompson, State's Attorney, *W. W. Miles,* and *David E. Porter* for the State.

To permit every respondent to question the competency and qualification of every witness before the grand jury would defeat the ends of justice. *State* v. *Dayton,* 23 N. J. L. 49; *U. S.* v. *Reed,* Fed. Cas. No. 16135; *People* v. *Hulbut,* 47 Am. Dec. 244; *Gitchell* v. *People,* 146 Ill. 175, 37 Am. St. Rep. 147; *Com.* v. *Hill,* 11 Cush. 137; *State* v. *Baker,* 20 Mo. 338; *State* v. *Fassett,* 16 Conn. 457; *State* v. *Rickey,* 10 N. J. L. 83.

Pleas in abatement are required to have the highest degree of accuracy and precision, leaving nothing to be supplied by intendment or construction. *Hill* v. *Powers,* 16 Vt. 516; *Bowman* v. *Stowell,* 21 Vt. 309; *Durand* v. *Griswold,* 26 Vt. 48; *Bank of Rutland* v. *Barker,* 27 Vt. 293; *Morse* v. *Nash,* 30 Vt. 76; *State* v. *Emery,* 59 Vt. 84; *State* v. *Ward,* 60 Vt. 142; *State* v. *Rife,* 18 R. I. 596, 30 Atl. 467.

For aught that appears in the plea there was legal evidence before the grand jury, as there is no allegation to the contrary. *People* v. *Lauder,* 82 Mich. 109; *Crane* v. *Warner,* 14 Vt. 40.

The grand jury could not have compelled respondents to testify, only the court could do that. *State* v. *Comer,* 157 Ind. 611, 62 N. E. Rep. 452; *Heard* v. *Pierce,* 8 Cush. 338, 54 Am. Dec. 757.

The privilege of a witness to refuse to give self-criminating evidence is personal. He alone can invoke it. 3 Wig. §§ 2268-2276; *Chamberlin* v. *Wilson,* 12 Vt. 491, 75 Am. St. Rep. 339. (Note).

If a witness, in response to a subpoena appears before the grand jury and voluntarily testifies to self-incriminating matters, the validity of an indictment against him cannot be impeached thereby. Thompson and Merriam on Juries, § 643; *People* v. *Lauder,* 82 Mich. 109; *State* v. *Comer,* 157 Ind. 611, 62 N. E. 452; *U. S.* v. *Kimball,* 117 Fed. 156; *U. S.* v. *Brown,* 1 Sawy. 531, Fed. Cas. 14671; *People* v. *King,* 28 Cal. 265; *State* v. *Donelson,* 45 La. Ann. 744.

ROWELL, C. J. This is an indictment against ten for conspiracy "to prevent, hinder, and deter" the several persons therein named, "by violence, threats, and intimidation, from further engaging and continuing in the business of manufacturing granite." Five of the prisoners were summoned before

the grand jury, and gave self-criminating evidence under oath, and they severally plead that in abatement. The other five jointly plead that in abatement, although they themselves were not called before the grand jury. The pleas are demurred to; but only McNaughton's several plea need be considered, as the others are essentially like it.

That plea alleges that while said indictment and the charges of conspiracy therein contained were pending before the grand jury, and while the grand jury was investigating and inquiring into said charges, and considering whether it would find said indictment, the prisoner appeared before the grand jury in obedience to a subpoena duly served upon him; that he did not then know that said indictment and charges were being investigated; that he was not permitted to have counsel, and was not advised in the premises; that he was sworn by the foreman of the grand jury to testify upon the subject-matter of said charges, and was required and compelled to make oath as a witness, and then and there under oath, was required and compelled to give testimony touching said indictment and charges, and was fully interrogated as to them, and questioned as to each and every detail, fact, and circumstance of the same, and was then and there obliged and compelled to make, and then and there did make, answer thereto on his oath; that he was not then and there informed by the grand jury, the State's attorney, nor any one else, and did not know that his own conduct and acts in reference to said charges were then and there in question and under consideration by the grand jury, and that he was not informed, and did not know, that he was then and there charged with any crime, and was not then and there warned nor advised of his right and privilege to refuse to give evidence against himself, and was wholly ignorant and uninformed of his rights in

that respect, and did then and there involuntarily and upon his oath answer all questions asked him concerning said charges, and was compelled to testify, and did testify, to facts that were material and necessary to establish the truth of said charges against him and the other respondents; that his said testimony was considered and acted upon by the grand jury in finding and presenting said indictment; and that he was summoned before the grand jury as aforesaid for the purpose of obtaining evidence from him upon which to find said indictment against him and the other respondents.

It is objected that as the matter complained of does not go to the qualification of the grand jury, but only to the propriety of its proceedings, it cannot be taken advantage of by plea in abatement, but only, if at all, by suggestion to the court. But we pass over that question, and consider the plea on its merits.

Our Constitution declares that no one can be compelled to give criminating evidence against himself. Such is the common law. *Nemo tenetur seipsum accusare.* It is objected that the plea is bad because it does not show that the prisoner *was* compelled to give criminating evidence against himself. This immunity is a personal privilege, and may be waived, and is waived if not seasonably asserted, and the testimony regarded as voluntary. *Chamberlin* v. *Wilson,* 12 Vt. 491. The plea does not show that the prisoner asserted his privilege. It alleges that he involuntarily testified. But that is subjective, signifying only his mental state, and means no more than unwillingly and reluctantly, and does not imply a disclosure of that mental state by objecting to answer nor otherwise; and until such disclosure was made in some way, there could have been no compulsion. True, the plea alleges compulsion; but that is only a conclusion, and is not warranted by the facts alleged.

In *People* v. *Lauder,* 82 Mich. 109, the prisoner, who was indicted for bribery, pleaded in abatement that he appeared before the grand jury in obedience to a subpoena, and being ignorant of the fact that charges of bribery against him were being inquired into, and without counsel, or being advised in the premises, he was required and compelled to, and did, give his testimony, and was fully interrogated as to said charges, and testified to facts material and necessary to prove their truth and to sustain the indictment, and that upon his testimony and that of other witnesses the indictment was found. The Court said that being subpoenaed and appearing before the grand jury was not a violation of the prisoner's constitutional rights, nor being sworn before that body, nor testifying upon any matter that did not criminate him, for the law compelled him to do all that under pains and penalties; but that it did not compel him to criminate himself, and that in all cases where a personal privilege exists for a witness to testify or not, and he testifies without objection, he will be deemed to have done so voluntarily. The Court went on to say that the prisoner did not say in his plea that he claimed his privilege, or refused to answer any question; that he averred that he was required and compelled to, and did, make answer to the questions put to him, but that that was a conclusion from the facts, whereas the rules of pleading in abatement required him to set forth the facts, and not his conclusions.

It is objected that that case is by a divided Court, and stands alone; and *Boone* v. *People,* 148 Ill. 440, is much relied upon as holding a different doctrine. It is true that the Michigan case is by a divided Court, but it does not stand alone, nor is the Illinois case opposed to it, for there, at the time of his examination before the grand jury, the prisoner was in custody in jail, charged with the very crime about which

he was examined and for which he was indicted; and therefore he stood as a party and not as a mere witness, and the Court specially noted that distinction. But in the Michigan case the prisoner was not in custody, charged with the offence, at the time he was examined, and therein lies a marked and fundamental difference between the cases.

State v. *Comer,* 157 Ind. 611, is practically like the Michigan case. There the prisoner was indicted for selling his vote in violation of the statute. He pleaded in abatement that for the purpose of obtaining evidence, and securing an indictment against him, the grand jury caused him to be summoned before them to answer such questions as might be propounded to him; that he appeared, and was sworn, and while under oath, was interrogated by the grand jury, and by them then and there compelled, forced, and caused involuntarily to testify to matters and facts concerning said crime; that he was not then and there informed by any one, and did not know, that he had the legal right to refuse to testify or give to the grand jury any evidence concerning his supposed connection with, or commission of, said crime, whereof the grand jury suspected him guilty; that if he had had such information and knowledge, he would not have testified about such facts, nor given the grand jury any evidence in relation thereto; and that the indictment was returned upon the testimony so given by him. The Court said that being summoned and appearing before the grand jury and being sworn, was not a violation of the prisoner's constitutional rights, and while before the grand jury he could be compelled to testify to any matter that would not criminate him, but could not be compelled to testify to any matter that would criminate him, and could claim his privilege or not, as he chose; but if he gave criminating evidence voluntarily, his constitutional rights were not thereby violated, for it is a general rule that when a personal privilege exists

for a witness to testify or not as he chooses, and he testifies without objection, he will be deemed to have done so voluntarily; that the allegation of the plea that the grand jury compelled and forced the prisoner involuntarily to testify to facts criminating himself, was a mere conclusion, whereas facts, and not conclusions, should have been alleged; that the grand jury could not have compelled him, but only the court, and that the plea did not show compulsion; that as to the allegation that the prisoner was not informed, and did not know, of his right to refuse to testify, the statute did not require the grand jury to give him such information; that everybody is presumed to know the law, and that the grand jury had a right to act upon the presumption that the prisoner knew his rights in the premises; that he was not in custody nor under bonds to answer to a charge of selling his vote, and no such charge was pending against him.

The line is definitely drawn in New York between cases in which the testimony of a witness can be used against him, and those in which it cannot be. Thus, when a witness is called and sworn before a coroner's jury before it has been ascertained that a crime has been committed, or before any one has been arrested, charged with the crime, the testimony of that witness, should he afterwards be charged with the crime, may be used against him on his trial; and the mere fact that at the time of his examination he was aware that a crime was suspected, and that he was suspected of being the criminal, will not prevent his being regarded as a mere witness whose testimony may be given in evidence against him, unless he claimed his privilege. But if, on the other hand, at the time of his examination, it appears that a crime has been committed, and that he is in custody as the supposed criminal, he is not regarded as a mere witness, but as a party accused, called before a tribunal vested with power temporarily to investigate

the question of his guilt, and he is to be treated the same as though brought before a committing magistrate, and if his examination is not taken in conformity with the statute, which requires his testimony to be taken without oath and on advice of privilege, it cannot be used against him. This is a judicial examination; that, an extra-judicial. *People* v. *Mondon*, 103 N. Y. 211, is an example of the latter class, and *Hendrickson* v. *People*, 10 N. Y. 13, of the former class, to which the case at bar belongs. There the prisoner's wife died suddenly in the morning, and in the evening of the same day a coroner's inquest was held, and the prisoner was called and sworn as a witness. At that time it did not appear that a crime had been committed, nor that the prisoner had been charged with any crime, nor even suspected, except as far as the nature of some of the questions asked him might indicate such suspicion. On his subsequent trial on an indictment for the murder of his wife, the statements made by him at the coroner's inquest were held admissible, on the ground that he was not examined as a party charged with a crime, but simply as a witness, and had testified without objection. The Court said that it is only in judicial examinations, namely, in the case provided for by statute, when a prisoner is brought before a magistrate charged with crime, that the preliminaries required by statute are to be observed, and the examination taken without oath and on advice of privilege; that all other examinations are extra-judicial; that one is the examination of a witness, the other, of a party; that in all cases, as well before coroners' inquests as on the trial of issues in court, when the witness is not under arrest, nor before the tribunal, charged with crime, he stands on the same footing as any other witness; that he may refuse to answer, and that his answers are to be deemed to be voluntary unless he is compelled to answer after having refused

to do so, in which case only will they be deemed to be compulsory and be excluded.

The same thing was held in *Regina* v. *Coote,* 12 Cox C. C. 557, which went up from the Court of Queen's Bench for the Province of Quebec on a case reserved. There certain officers called "fire marshals" were appointed under a statute, with power to inquire into the origin of fires in Montreal and Quebec, and for that purpose to compel the attendance of witnesses and examine them on oath, and to commit to prison any witness refusing to answer without just cause. On an inquiry held in pursuance of that statute as to the origin of a fire in a warehouse occupied by the prisoner, he was examined on oath as a witness. At the time of such examination there was no charge against the prisoner nor any one else, and he was not cautioned that his evidence might be used against him. Subsequently the prisoner was tried for arson of said warehouse, and his depositions made at said inquest were admitted in evidence against him, and properly so, it was held. After reviewing the cases, their Lordships gave it as their opinion that the depositions on oath of a witness legally taken, are evidence against him should he be subsequently tried on a criminal charge, except so much of them as consist of answers to questions to which he has objected as tending to criminate him, but which he has been improperly compelled to answer; that the exception depends upon the principle, *nemo tenetur seipsum accusare,* but does not apply to answers given without objection, which are to be deemed to be voluntary. To the objection that the prisoner should have been cautioned as prisoners accused before magistrates are required to be by statute, their Lordships said that the statute applied only to accused persons, and not to a mere witness, as the prisoner was.

In *Cloggett's Case,* Dearsley, C. C. 656, the Court said that the test is, not whether the witness could discriminate between matters to which he was bound to testify and those to which he was not, but whether he might have objected; that if he might have and did not, he voluntarily submits to testify.

It is unnecessary to inquire whether the conditions and circumstances of a case may not be such as to speak for the witness, and, of themselves, constitute compulsion, for the plea does not present a state of facts calling for such inquiry.

But the privilege is an option of refusal, not a prohibition of inquiry. Hence, when an ordinary witness is on the stand, and a self-criminating act relevant to the issue is desired to be shown by him, the question may be asked, and then it is for the witness to say whether he will answer it or claim his privilege, for it cannot be known beforehand which he will do. 3 Wig. Ev. § 2268; Rapalje's Law of Witnesses, § 265; *Short* v. *State,* 4 Harr. (Del.) 568. A witness must obey a subpoena, and be sworn; then he may claim his privilege. *In re Eckstein,* 148 Pa. St. 509, 24 Atl. 63; *United States* v. *Kimball,* 117 Fed. Rep. 156, 163; *Boyce* v. *Wiseman,* 10 Exch. 647.

Some of the cases already referred to relate to the question of notifying the ordinary witness of his privilege, and warning him of possible consequences, and such used to be the English practice. Mr. Erskine once said that he conceived it to be of all things the most idle, to recognize the privilege as a principle of law, and not at the same time warn the witness that his answer might criminate him. But in Lord Eldon's time the practice had come to be otherwise, he said, and he would not suppress an interrogatory in chancery allowed by the master, but let it be put, assuming that the witness would claim his privilege if he wanted to. *Paxton* v. *Douglas,* 16

Ves. 242. Parke, B., said in *Attorney General* v. *Radloff*, 10 Exch. 87, that he thought the witness ought to make the objection himself, though he understood that in Lord Cardigan's case, Lord Denman interposed to prevent a witness from answering a question having a tendency to elicit self-criminating evidence. It seems clear, upon the authorities, that the old practice has disappeared in England, as far, at least, as any general rule is concerned.

But in this country, Mr. Wigmore says, both the rule and the trial custom vary in different jurisdictions; that no doubt a capable and an impartial judge will give the warning when need appears; but that there is no reason for letting a wholesome custom degenerate into a technical rule. 3 Wig. Ev. § 2269. In this State the law does not require the warning, though ordinarily it is given, either by counsel, or by the court on its own motion or at the suggestion of counsel. But the privilege is the witness's, and he alone must claim it. *Chamberlin* v. *Wilson*, 12 Vt. 491. In Massachusetts it is within the discretion of the court, and the usual practice, to advise a witness that he is not bound to criminate himself, when it appears necessary to protect his rights. *Mayo* v. *Mayo*, 119 Mass. 292. So in *Janvrin* v. *Scammon*, 29 N. H. 280, 290, it is held that as the privilege is personal to the witness, it is for him to say in the first place whether he will answer; but that the court will frequently interpose, and inform him of his privilege when it sees that his answer might tend to criminate him. This seems to be the general practice in this country; but in some of the states it is otherwise. Thus, in Virginia it is held that as a general rule the witness should be warned of his privilege before he can be held to have waived it by answering. *Cullen* v. *Commonwealth*, 24 Gratt. 624.

Thus it appears that the allegations of the plea that the prisoner did not know what was going on before the grand jury, and was not advised of his privilege, are immaterial, for it is not shown that at the time he testified before that body it had been ascertained that a crime had been committed, nor that he was in custody, charged with the crime, nor even suspected of it, and therefore he stood as an ordinary witness, and not at all as a party.

Nor is the allegation that he was "wholly ignorant" of his rights in respect of his privilege, material, for he is to be treated just as if he knew them, for ignorance of the law excuses no one. *Coote's* case, above referred to, is in point here. There the Chief Justice of the court below suggested that *Coote* might have been ignorant of the law enabling him to decline to answer criminating questions, and that if he had been acquainted with it, he might have withheld some of the answers he gave. Their Lordships said that as a matter of fact it would appear that he was acquainted with so much of the law; but whether he was or not, it was obvious that to institute an inquiry in each case as to the extent of the prisoner's knowledge of the law, and to speculate whether, if he had known more, he would or would not have refused to answer certain questions, would be to involve a plain rule in endless confusion; and their Lordships saw no reason to introduce, with reference to this subject, an exception to the rule, recognized as essential to the administration of the criminal law, *ignorantia legis non excusat.*

The plea, therefore, is held bad, and the other pleas must fall with it.

The indictment is demurred to for that it does not charge the offence with the requisite certainty. It is claimed that although it is in this respect almost identical in language with

the indictments in *State* v. *Stewart,* 59 Vt. 273, and *State* v. *Dyer,* 67 Vt. 690, which were held good, yet that those cases are not authority for holding this indictment good, because there the conspiracy related to the preventing, hindering, and deterring of workmen from accepting, undertaking, and prosecuting the work of stone cutting, which was made criminal by statute. But the statute is directed more to the means of accomplishing the object of the conspiracy than to the conspiracy itself, and it was held in both of those cases that the indictment charged a conspiracy to do an act unlawful at common law, by means unlawful by statute. Tested by those cases, to which we refer for the law of the subject, it is clear that this indictment charges a conspiracy to do an act unlawful at common law, and therefore is good, without more.

Judgment affirmed, and cause remanded.

STATE *v.* ROBERT WATERMAN.

October Term, 1905.

Present: ROWELL, C. J., TYLER, WATSON, and HASELTON, JJ.

Opinion filed February 2, 1906.

Criminal Law—Grand Jury—Disqualification of Member—Plea in Abatement—Sufficiency—Struck Juries—V. S. 1127, 1134, 1137.

V. S. 1127, providing that a person drawn from a town of more than two hundred inhabitants to serve as a petit juror is disqualified from again serving as juror for two years from such drawing, does not apply to struck juries.

V. S. 1134, 1137, regards a struck jury as "drawn," and calls it a "special jury," and its individual members "special jurors."

A plea in abatement must not only fully answer what is adversely alleged, but must also anticipate and exclude all supposable matter that would, if alleged on the other side, defeat it.

To an indictment for murder the respondent pleaded in abatement that one of the grand jurors who participated in finding and presenting said indictment was drawn within two years to serve as a petit juror from a town of more than two hundred inhabitants, "without this that said" grand juror, during the session of court at which said indictment was found and presented, "was summoned as a petit juror to serve at said session of said court." *Held*, bad on demurrer because the *absque hoc* fails to negative that said grand juror was drawn as a special struck juror; that it is not enough to negative that he was summoned during said session, for a struck jury is summoned before the term, except talesmen to fill the panel.

INDICTMENT for murder. Heard on demurrer to plea in abatement of the indictment at the October Term, 1905, Essex County, *Powers*, J., presiding. Demurrer sustained, and plea adjudged insufficient. Respondent excepted.

Harland B. Howe for the respondent.

Blodgett was disqualified to act as grand juror, and the indictment is illegal. *State* v. *Ward*, 60 Vt. 142; *Bank* v. *Post*, 66 Vt. 237; *Briggs* v. *Georgia*, 15 Vt. 61; *Quinn* v. *Halbert*, 52 Vt. 367; *Richards* v. *Moore*, 60 Vt. 440; *State* v. *Brewster*, 70 Vt. 341; *Mann* v. *Fairlee*, 44 Vt. 672; *State* v. *Wilcox*, 104 N. C. 847, 10 S. E. 453; *Com.* v. *Cherry*, 2 Va. Cas. 20; *State* v. *Cole*, 17 Wis. 674; *State* v. *Herndon*, 5 Blackf. 75; *Barney* v. *State*, 20 Miss. (12 Smedes & M.) 68; *State* v. *Rockafellow*, 6 N. J. Law, (1 Halst.) 332; *Jackson* v. *State*, 11 Tex. 261; *Stanley* v. *State*, 16 Tex. 557; *Kerby* v. *Com.*, 7 Leigh 747; *State* v. *Durham Fertilizer Company*, 111 N. C. 658, 16 S. E. 231; *State* v. *Davis*, 12 R. I. 492, 34 Am. Rep. 704; *U. S.* v. *Hammond*, Fed. Cas. No. 15294;

Com. v. *Smith,* 73 Ky. (10 Bush) 476; *State* v. *Duncan,* 15 Tenn. (7 Yerg.) 271; *State* v. *Kennedy,* 8 Rob. 590; *State* v. *Jones,* 8 Rob. 616; *State* v. *Parks,* 21 La. Ann. 251; *State* v. *Rowland,* 36 La. Ann. 193; *Com.* v. *Long,* 2 Va. Cas. 318; *Barger* v. *State,* 6 Blackf. 188; *State* v. *Middleton,* 5 Port. 484; *State* v. *Segar,* 7 Port. 167; *State* v. *Clarissa,* 11 Ala. 57; *Com.* v. *St. Clair,* 1 Grat. 556; *Doyle* v. *State,* 17 Ohio 222; *State* v. *Duncan,* Yerg. 527; *State* v. *Bryant,* 10 Yerg. 271; *State* v. *Brooks,* 9 Ala. 10; *State* v. *Symonds,* 36 Me. 128; *State* v. *Martin,* 2 Ind. 101; *State* v. *Brown,* 5 Eng. 78; *Stokes* v. *State,* 24 Miss. 621; *McQuillen* v. *State,* (8 Sm. & M. 587).

The question of the disqualification of a grand juror is properly raised by plea in abatement. *State* v. *Newfane,* 12 Vt. 422; *State* v. *Champeau,* 52 Vt. 313; *State* v. *Cox,* 52 Vt. 471; *State* v. *Brainard,* 56 Vt. 532; *State* v. *Emery,* 59 Vt. 84; *State* v. *Ward,* 60 Vt. 142; *State* v. *Brewster,* 70 Vt. 341; *State* v. *Johnson,* 72 Vt. 118.

Clarke C. Fitts, Attorney General, *Harry B. Amey,* State's Attorney, and *Harry Blodgett* for the State.

If any irregularity enters into the drawing or impaneling of a grand jury, it must be shown to have worked an injury, to be available. *State* v. *Ward,* 60 Vt. 142; *State* v. *Champeau,* 52 Vt. 313; *State* v. *Cox,* 52 Vt. 471; *State* v. *Brewster,* 70 Vt. 351; *Dolan* v. *People,* 64 N. Y. 485; *Com.* v. *Moran,* 130 Mass. 281.

The general rule is, that mere irregularity in the proceedings by which a juror gets upon the panel does not affect the validity of his action. *State* v. *Brainard,* 56 Vt. 552; *Com.* v. *Brown,* 147 Mass. 585.

ROWELL, C. J. This is an indictment for murder. The statute provides that "each person drawn by the sheriff or his deputy to serve as grand or petit juror from a town containing more than two hundred inhabitants, shall be disqualified from again serving as juror for two years from such drawing." V. S. 1127. Relying on this statute, the prisoner pleads in abatement that Burt L. Blodgett, one of the grand jurors who participated in finding and presenting said indictment, was drawn within two years to serve as a petit juror from the town of Lemington, which contained more than two hundred inhabitants. The sufficiency of this plea is challenged by demurrer. It alleges, in substance, as inducement, that on the 12th day of March, A. D. 1904, and before the session of the March term, 1904, of the Essex County Court, said Blodgett was drawn and summoned to serve as petit juror at said session of said court, and did then and there attend as such juror, and qualified, acted, and served as such through said term; "without this, that said Blodgett was, during said last mentioned session of said court, summoned as a petit juror to serve at said session of said court."

A plea in abatement must not only fully answer what is necessary to be answered, but must also anticipate and exclude all supposable matter that would, if alleged on the other side, defeat it. Tested by this rule, the plea is bad, because the *absque hoc* does not perform its office by curing the argumentativeness of the inducement by negating that Blodgett was drawn as a special or struck juror; for to such a juror, the statute relied upon does not apply. It is not enough to negate that Blodgett was summoned during said session, for a struck jury is to be summoned before the term, the same as an ordinary petit jury, except talesmen summoned to fill the panel.

The argument that struck jurors are not drawn, but are selected and listed by the assistant judges and the county

clerk, acting as commissioners; that there is no such thing in our law as a special juror; and that therefore it is sufficient to negate that Blodgett was summoned during the term,—is not well founded, for the statute speaks of and regards a struck jury as "drawn," and calls it a "special jury," and its individual members "special jurors." V. S. 1134, 1137.

There are other objections made to this plea, but they need not be considered. The other pleas are waived.

Affirmed and remanded.

R. E. SAMSON ET AL. *v.* TOWN OF GRAND ISLE ET AL.

October Term, 1905.

Present: ROWELL, C. J., TYLER, MUNSON, WATSON, HASELTON, and POWERS, JJ.

Opinion filed February 2, 1906.

Towns—High Schools—Instruction of Advanced Pupils—Vested Rights of Taxpayers—School Directors—Mandamus—No. 37, Acts 1904.

The facts that a town accepted a gift of money given for the purchase of a specified building therein "for a graded school building," and thereupon purchased said building with said money for that purpose, and then appropriated and paid money out of the town school fund for equipping it "for school purposes," and maintained a select school therein for two years, and voted, assessed, and collected taxes to pay the expense thereof, did not vest in the taxpayers of said town the right to have the town continue to maintain said school.

No right vests in methods and procedure when not a part of the right itself.

Maintaining this school was but the way the town voluntarily elected to furnish higher instruction to advanced pupils, and that way was not a part of the right to such instruction if such right then existed, and therefore the town could abandon that way at any time, and the school directors have no authority to continue said school against the will of the town.

Under § 2, No. 37, Acts 1904, it is discretionary with the school directors whether they will provide for the instruction of advanced pupils in the high school or schools of the town, or in the high schools or academies of other towns within or without the State; therefore, they cannot be compelled to select one course *instead* of another, but only to select one course *or* the other, if they should refuse to select either.

As it does not appear that the defendant school directors have refused to select either course, and the answer avers that they always have been and still are ready and willing to furnish high school instruction to all pupils of the town legally entitled thereto, and denies that they ever refused to do so, mandamus cannot issue to compel the establishment and maintenance of a high school by the town.

PETITION FOR MANDAMUS brought to the Supreme Court for Grand Isle County at its October Term, 1905. Heard at that term on petition and answer.

This is a complaint for a writ of mandamus to compel a high school in the town of Grand Isle. Only two of the board of school directors are made parties, and they appear and answer, but the town does not appear. The case was heard on complaint and answer by agreement.

The complaint alleges that there are a large number, to wit, twenty-five pupils in said town, eligible to enter a high school, and that among the relators are parents representing a large majority of said pupils; that in the summer of 1902 there was a desire among a majority of the voters in said town to establish a graded or high school therein, and that there was an old church in said town known as the South Church, which was for sale, and on July 19, 1902, at a special

town meeting duly warned and held for that purpose, among other things, the town appropriated $500 to buy said church for a school building, which vote has never been rescinded, but which appropriation has never been raised; that afterwards one Davis, a resident and taxpayer of said town, offered to give to it $500 to purchase said church provided a graded or high school should be maintained therein, and that on August 7, 1902, at a special meeting duly warned for that purpose, the town voted to accept said sum as a gift from said Davis, "to purchase the South Church for a graded school building," and appropriated sufficient funds to equip said building for school purposes; that immediately thereafter said Davis paid said sum to the town, wherewith it bought said church in accordance with said vote, and expended the sum of $300 of the school fund of the town in fitting it up for school purposes; that in the fall of that year the town established a high school in said building, and maintained the same therein that school year and the next, and paid the expenses out of the general school fund of the town, except a small part thereof, which was paid by the parents of pupils attending the school; that in April, 1904, at a special meeting duly warned for that purpose, the town voted not to maintain said school, which the complaint avers the town had no right to do, and that said vote was void and of no effect; and thereafter certain citizens of the town who were interested in said school formed an organization for maintaining it, and obtained from the school directors a lease of said building without rent, and maintained a high school therein that school year on the tuition plan, no part of the expense being paid out of the town school fund.

The complaint further alleges that at the annual meeting in 1905, the town again voted to establish and maintain a high school; that at a special meeting in April, 1905, the town

tabled an article to rescind said vote, and an article to pay the tuition of scholars attending said school; but that at a special meeting held May 27, 1905, said vote was rescinded, and at a special meeting held June 24, 1905, the town voted not to establish and maintain a high school; and the complaint denies the right of the town to rescind said vote, and avers that the votes of the said several special meetings since said annual meeting are void and of no effect.

The complaint further alleges that from the annual meeting in 1905 to the 15th of June, 1905, a high school was maintained in said building by certain citizens, as aforesaid; that from said annual meeting to the said 27th of May, the defendants Wilcox and Donaldson refused, and ever since have refused and still do refuse, to take any action towards maintaining said school, and have paid none of the expenses thereof; that the yearly cost of maintaining said school is between six and seven hundred dollars; that previous to its establishment, forty cents was the highest tax voted for school purposes; that in 1902 it was thirty-five cents; in 1903 and 1904, fifty cents; and in 1905, fifty-five cents; that during the school years 1902-3 and 1903-4, when the town maintained said school, the expense of the same was paid out of the general school fund, which was sufficient for that purpose and for all the other school expenses of those years, except what was paid by citizens as aforesaid; and that the average expense of the common schools has not materially increased for the last six years.

The complaint further alleges that at the annual meetings in 1904 and 1905, it was the intention of the relators and of all the other voters interested to have said school maintained, to have it maintained by the town, and the expense thereof paid as in 1902 and 1903, and that there is now in the hands of the town treasurer, collected and to be collected, the sum of $1800, voted and assessed for the purpose of maintaining

said school, and is enough to maintain it for two years; that the board of school directors consists of the defendants Wilcox and Donaldson and one Kinney, and that Wilcox and Donaldson have hitherto neglected and refused, and have given out in speeches that they intend to refuse, to open said high school during the coming school year, or to take measures to maintain it, or to pay the tuition of children of citizens of the town attending a high school in said town or elsewhere, but that Kinney is in sympathy with the relators, and would, if permitted by the rest of the board, take the necessary steps to open and maintain said school; and the relators aver that in consequence of the neglect and refusal of Wilcox and Donaldson, and of the votes at the special meetings since the annual meeting of 1905, they are unlawfully and unjustly deprived of the rights that vested in them in respect of said high school by reason of the premises and the laws of this State. The prayer is for a writ, commanding the defendants forthwith to take the necessary steps to open said high school, to employ competent teachers for the same, and to maintain said school, and for general relief.

The answer admits the purchase and fitting up of the South Church, as alleged, but denies that said gift was for establishing and maintaining a high school therein, but avers that it was only for graded school purposes; denies that the town ever established or maintained a high school therein, but admits that the school directors maintained a school therein in which were taught the more advanced pupils of the town, with others less advanced, but avers that the standard of the pupils' educational advancement as being entitled to high school privileges under the law was not considered; admits that when in April, 1904, the town voted not to maintain a high school, the school directors turned said building over to certain persons without rent, as alleged, who have and do

maintain a select school therein on the tuition plan; avers that the town contained only 857 inhabitants according to the latest public census taken by the authority of the United States, and first voted to establish and maintain a high school at the annual meeting in 1905, and admits that thence until that vote was rescinded in May, a period of two months and twenty days, the town was under liability to establish and maintain a high school; but avers that during all that time the question of whether that vote should stand was being agitated, for which reason the defendants did not deem it expedient to undertake immediately to establish or maintain a high school, but that they did intend within a reasonable and proper time to perform their full duty in the conduct of such high school agreeably to said vote; and denies that they ever neglected or refused to perform their whole duty in the matter; but avers that they are informed and believe that they are estopped from further proceeding to establish and conduct a high school because of the action of the town in rescinding the vote to establish one as aforesaid, and in subsequently voting not to maintain one.

The answer further avers that the defendants are ready and ever have been to furnish high school instruction to all the pupils of the town that are eligible under the law to high school privileges; and denies that they have ever refused, or given out in speeches that they intend to refuse, to furnish or pay for such instruction as is contemplated by the law; and denies that they have ever sought to deprive such pupils of any privileges secured to them by the law; and avers that the town has never voted a tax to maintain a high school, and that the increase of taxes alleged was not for that purpose, but was necessitated by the institution of longer terms of school, additional expense of maintaining them and providing for the instruction of advanced pupils as required by law.

Lee S. Tillotson, and *Alfred A. Hall* for the relator.

A writ of mandamus may properly issue against a town. *Leavenworth Co.* v. *Sellew,* 99 U. S. 624; *Davenport* v. *U. S.,* 9 Wall. 409; *Glencoe* v. *People,* 78 Ill. 382; *Chicago* v. *Sanson,* 87 Ill. 182; *Wren* v. *Indianapolis,* 96 Ind. 206; *State* v. *Milwaukee,* 25 Wis. 122; *Cooperrider* v. *State,* 46 Neb. 84.

Where a vote of a town is in the nature of a contract with an individual it cannot be reconsidered. *Cox* v. *Mt. Tabor,* 41 Vt. 28; *Nelson* v. *Milford,* 7 Pick. 18; *Jewett* v. *Alton,* 7 N. H. 253; *Brown* v. *Winterport,* 79 Me. 305.

M. A. Bingham for the defendants.

ROWELL, C. J. It is to be taken on the pleadings that the school maintained by the town in the building mentioned, was not a high school within the meaning of the statute, but was at most no more than a select school, a thing not known to the statute. But the relators claim that the status of the school is not material, because they say that the right to have and enjoy its privileges became vested in them and other taxpayers by the following acts of the town, namely: (1) by the acceptance of the gift from Davis with its conditions; (2) by the purchase of the church therewith "for a graded school building"; (3) by the appropriation and payment of money out of the town school fund for equipping said building "for school purposes"; (4) by the opening of said school, and the payment of the expenses thereof for the two years mentioned; and (5) by voting, assessing, and collecting taxes for maintaining the same. They say that while it is, by statute, for the school directors to regulate the expenditure of school money, and to determine the number and location of schools, yet that that authority must be exercised with sound legal dis-

cretion, and that if their discretion is abused and made to work injustice, as it is claimed it has been here, it may be controlled by mandamus.

As to the vested right claimed. Since the town was not bound by statute to establish and maintain said school, nor yet by the Davis gift, which called for a graded school, which this was not, the fact that the town appropriated and used school money to equip said building "for school purposes," and opened said school therein, and voted, assessed, and collected taxes to maintain it, and paid the expenses thereout for two years,—vested no right in the relators to have it continued, for it was but the way the town voluntarily selected, to furnish higher instruction to advanced pupils, and that way was not part of the right to such instruction, if any such right then existed, and therefore the town could abandon that way at any time, for no right vests in methods and procedure when not a part of the right itself.

This being so, abuse of discretion on the part of the school directors is not predicable of their refusal to continue said school against the will of the town, for they had no authority to do so.

As to the claim for a high school. No. 37 of the Acts of 1904 provides, among other things, that every town shall establish and maintain a high school, or furnish higher instruction for advanced pupils as therein provided; and that the board of school directors shall provide for the instruction of advanced pupils in the high school or schools of the town, in the high school of an incorporated school district or academy within the town, or in the high schools or academies of other towns within or without the State; provided the tuition paid for such instruction shall not exceed so much for such a time for each pupil.

It follows, therefore, it being discretionary which of the prescribed courses shall be selected, that those whose duty it is to select, cannot be compelled to select one course *instead* of the other, but only to select one course *or* the other, if they should refuse to select either. As it does not appear that they have thus refused, and as the answer avers that the defendant directors always have been and still are ready and willing to furnish high school instruction to all the pupils of the town that are eligible under the law to high school privileges, and denies that they have ever refused, or given out in speeches that they intend to refuse, to furnish or pay for such instruction as the law contemplates, and that they have never sought to deprive such pupils of any privileges secured to them by the law, a writ cannot issue for the establishment and maintenance of a high school.

Complaint dismissed with costs.

STATE *v.* THOMAS SUITER.

May Term, 1905.

Present: ROWELL, C. J., MUNSON, START, WATSON, HASELTON, and POWERS, JJ.

Opinion filed February 2, 1906.

Intoxicating Liquors—Keeping for Illegal Sale—Evidence—Searches on Illegal Warrants—Necessity of Proof of Sales—Sufficiency of Information—Conviction of Several Offences—Improper Remarks of Counsel.

In a prosecution for keeping intoxicating liquor for sale, without a license, certain articles found on respondent's premises and which

tended to establish his guilt, were admissible in evidence against him, although they were seized and taken by virtue of illegal search warrants.

In a prosecution for keeping intoxicating liquor for sale without a license, officers may testify as to all they saw and found while making illegal searches of respondent's premises.

Evidence examined and *held* that it tended to connect respondent with certain ale, liquor, and other articles found in an apartment of his premises which was occupied by his tenant.

The jury were properly instructed that they might convict the respondent if he controlled said liquor, though said tenant actually owned it.

The crime of keeping intoxicating liquor for sale without a license, may be established without proof of actual sales.

Respondent did not testify, and his counsel said in argument: "The respondent has never committed a crime in his life. If he had there would have been some record of it, and the State could have shown it." In the closing argument the State's Attorney replied: "If the respondent had been put upon the stand, it could have been shown that he had been convicted of many crimes." To which statement respondent excepted. The court held that the statement should be withdrawn, which was immediately done. *Held*, that each remark was unwarranted and improper but that, as the latter was provoked by the former, was promptly dealt with by the court and immediately withdrawn, a reversal was not warranted.

In a prosecution, under No. 90, Acts 1902, for keeping intoxicating liquor for sale without a license, the respondent may be convicted of as many offences as are severally charged by distinct counts in the information.

An information charging respondent with keeping intoxicating liquor for sale without a license, need not allege how the liquor was kept for sale.

The second and third counts of an information charging the keeping of intoxicating liquor for sale without a license, alleged that the liquor was kept for sale at "Hardwick aforesaid," and the first count showed that Hardwick is in Caledonia County. *Held*, on motion in arrest of judgment, that the second and third counts sufficiently show where the liquor was kept for sale.

INFORMATION for keeping and exposing intoxicating liquor for sale, without a license, in violation of No. 90, Acts

1902. Plea, not guilty. Trial by jury at the December Term, 1904, Caledonia County, *Tyler,* J., presiding. Verdict, "guilty of one offence." Judgment on verdict. The respondent excepted.

The information is in four counts. The first count charges that the respondent, on a specified day, "did expose for sale intoxicating liquor," etc.; the second, that, on a day specified, "he did keep for sale intoxicating liquor," etc.; the third, that, on a day specified, he "did keep and expose for sale intoxicating liquor," etc.; and the fourth, that he, on a day specified, "and on divers other days and times between that day and the bringing of this information, did expose and keep for sale intoxicating liquor," etc. At the close of the evidence the State disclaimed any right to a conviction on the ground of "exposing for sale," and "elected to rely upon the allegations of keeping intoxicating liquor for sale."

After verdict, the respondent moved in arrest of judgment on twelve grounds, most of which are abandoned in the brief. The third ground was: "For that the information does not allege how and in what manner the respondent exposed said liquor for sale." The seventh ground was: "Because there is no count in the information which alleges that the respondent kept intoxicating liquor for sale in the State of Vermont." The respondent also moved to set aside the verdict on five grounds which are sufficiently stated in the opinion. Both these motions were denied, to which the respondent excepted.

M. M. Gordon, and *Harland B. Howe* for the respondent.

The articles seized on the illegal search warrants were improperly received in evidence and any evidence of what the officers saw or found while serving such warrants was inadmissible. *State* v. *Giles Bacon,* 7 Vt. 219; *State* v. *Con*

O'Keefe, 41 Vt. 691; *Com.* v. *Barnard,* 6 Gray 488; *State* v. *Cotton,* 4 Foster (N. H.) 143.

Frank D. Thompson, State's Attorney, and *David E. Porter* for the State.

The rule as established by the overwhelming weight of authority is that though papers and other subjects of evidence may have been illegally taken from the possession of the party against whom they are offered, or otherwise unlawfully obtained, this is no valid objection to their admissibility if they are pertinent to the issue. 1 Greenl. Ev. § 254a; 3 Wig. Ev. §§ 2183, 2264; *Adams* v. *New York,* 192 U. S. 585; *Legatt* v. *Tollervey,* 14 East 302; *Reg.* v. *Granatelli,* 7 State Trials, N. S. 979, 987; *Reg.* v. *Doyle,* 12 Ont. 350; *Scott* v. *State,* 113 Ala. 64; *Starchman* v. *State,* 62 Ark. 538; *State* v. *Griswold,* 67 Conn. 290, 33 L. R. A. 227; *Williams* v. *State,* 100 Ga. 511, 39 L. R. A. 269; *Siebert* v. *People,* 143 Ill. 571; *Com.* v. *Dana,* 2 Met. 329; *Com.* v. *Tibbets,* 157 Mass. 519; *Com.* v. *Hurley,* 158 Mass. 159; *State* v. *Pomeroy,* 130 Mo. 489; *State* v. *Flynn,* 36 N. H. 64; *State* v. *McDaniel,* 39 Or. 161; *People* v. *Adams,* 176 N. Y. 351, 63 L. R. A. 406; *State* v. *Atkinson,* 40 So. Car. 363, 42 Am. St. Rep. 877; *State* v. *Nordstrom,* 7 Wash. 506; *State* v. *Edwards,* 51 W. Va. 220, 59 L. R. A. 465; *Boyd* v. *U. S.,* 116 U. S. 616; *Spaulding* v. *Preston,* 21 Vt. 9; *State* v. *Wade,* 63 Vt. 80; *State* v. *Burroughs,* 72 Me. 479; *Com.* v. *Henderson,* 140 Mass. 303; *State* v. *O'Connor,* 3 Kan. App. 594.

By the production in evidence of the articles seized on illegal search warrants, respondent was not compelled to give evidence against himself. He was not compelled to testify about these articles. *Gindrat* v. *People,* 138 Ill. 103.

The information sufficiently sets forth the crime charged. *State* v. *Clark,* 44 Vt. 636; *State* v. *Cook,* 38 Vt. 437; *State* v. *Jones,* 33 Vt. 43; *State* v. *Hodgson,* 66 Vt. 134; *Com.* v. *Dana,* 2 Met. 329, 341.

POWERS, J. The respondent is charged by information with keeping intoxicating liquor for sale contrary to law. The State's evidence tended to show that certain police officers on four different occasions searched the respondent's premises in Hardwick for intoxicating liquor under the authority of certain search warrants issued therefor; that they found on one occasion, in a cellar occupied by one Hall as respondent's tenant adjacent to the respondent's pool room and separated therefrom by a board partition, a barrel partially filled with ale; that the barrel had a faucet in it and stood upon a box a little above and about a foot from a hole in said partition big enough to admit a man's hand; that the barrel was so placed that the faucet faced this hole, which opened into the space enclosed by a counter or bar in the respondent's pool room; that this bar was supplied with glasses, some of which were described as whiskey glasses; that on one of these searches a large quantity of liquors of various kinds was found in a trunk in the tenement over the pool room, which tenement was occupied by Hall as aforesaid; that on another occasion two or three bottles of liquor were found in the dining room of the tenement; that a large number of empty bottles were found on the place, and an empty whiskey keg in the barn; that a piece of rubber hose was found in Hall's part which the State claimed was used to draw ale from the barrel mentioned; that drunken men were seen in and about the respondent's place on different occasions.

The faucet, rubber hose, and liquor found were brought away and produced and used as exhibits at the trial. The

policemen were allowed to testify fully as to all they saw and found while making the searches. The respondent seasonably objected to the testimony of these policemen and specified six grounds of exception thereto, all based upon the alleged illegality of such searches and of the warrants under which they were made. The evidence was properly received, for the legality of the searches or the warrants was not involved. *State* v. *Krinski,* 78 Vt. 162, 62 Atl. 37; *State* v. *Barr,* 78 Vt. 97, 62 Atl. 43.

The respondent excepted to the admission of the faucet, hose and liquor, and the evidence relative to the drunken men, but this is all within the holding in the Krinski case, and for the reasons there stated properly admitted. *State* v. *Gagne,* (Mass.) 10 L. R. A. 442. It was further objected that all evidence relative to the ale, liquor, faucet, and rubber hose was inadmissible because these things were all found on Hall's premises and not on the respondent's, and that there was no evidence tending to connect the respondent with them; and on this question we are referred to the record. Turning to the record, we find the evidence said to be lacking. For the facts that the respondent rented the whole building and then sublet a part to Hall; that he and Hall recently moved to Hardwick together, went and looked over this building together before it was rented, were constantly together on the streets and in the public places of the village; the facts that the barrel of ale was placed so as to face the wall instead of the cellar room, with the faucet within easy reach of the hole in the wall behind the bar, with the hose handy by; the quantity and variety of the liquors found up stairs; the whiskey glasses, the empty bottles, and other facts revealed by the record, when taken together, had a strong tendency to convince the practical mind that the whole arrangement was a device to shield the

respondent and enable him to carry on the unlawful traffic in safety.

At the close of the State's evidence and again at the close of all the evidence, the respondent moved for a verdict of acquittal on six separate grounds. Five of these raise the same questions in different form which have already been disposed of. The other was "because there is no evidence tending to show that the respondent ever sold or was a dealer in intoxicating liquor." It was quite unnecessary to make such proof. The offence charged was keeping for sale, and that offence is made out without proof of actual sales.

The respondent did not testify; and his counsel said in argument: "The respondent has never committed a crime in his life. If he had there would have been some record of it, and the State could have shown it." In the closing argument, the State's Attorney replied: "If the respondent had been put upon the stand it could have been shown that he had been convicted of many crimes." To which statement the respondent excepted. The court promptly held that the statement should be withdrawn, and the State's Attorney immediately withdrew it. Both remarks were unwarranted and improper, but the one complained of was provoked by the other, was promptly dealt with by the court, immediately withdrawn, and does not call for a reversal. *McMullen* v. *Erwin,* 69 Vt. 338; *State* v. *Young,* 74 Vt. 478; *Kilpatrick* v. *Railway Co.,* 74 Vt. 288.

The respondent seasonably presented six requests to charge, and excepted to the court's failure to charge in accordance therewith. An examination of the charge reveals the fact that they were all sufficiently complied with;—not in the exact language of the requests, but in terms which left no just reason for complaint.

Seventeen exceptions were taken to the charge as given. It is unnecessary to take these up one by one, as most of them

are abandoned in the respondent's brief, and the only claims which he now makes are these: That the charge was too vague and uncertain,—and this is refuted by the record; that the court failed to call attention to the question of reasonable doubt,—and the record shows otherwise; that the court submitted certain matters to the jury,—and this only involves the admissibility of the evidence already passed upon; that the court instructed the jury that they might find the respondent guilty of two offences,—and this was correct,—*State* v. *Darling*, 77 Vt. 67, though the verdict was for only one; that the jury were instructed that they might convict if the respondent controlled the liquor, though Hall actually owned it,—and this too was correct.

The respondent moved in arrest of judgment on seven grounds. Most of these are abandoned in the brief, and the only one requiring notice is that the information does not allege how or where the liquor was kept for sale. It was not necessary to allege how it was kept for sale. The description of the offence was complete without specifying the particular manner in which it was kept for sale. *State* v. *Paige*, 78 Vt. 286. The second and third counts allege that the liquor was kept for sale at "Hardwick, aforesaid"; and by reference to the first count, we learn that Hardwick is in Caledonia County, —which is sufficient.

The respondent also moved to set aside the verdict on five different grounds. These all relate to and challenge the sufficiency of the evidence to connect the respondent with the liquor found, and have been hereinbefore disposed of.

Judgment that there is no error, and that the respondent take nothing by his exceptions. Let execution be done.

CLARENCE R. MARSH ET AL. *v.* EDWARD S. MARSH, ET AL.

May Term, 1905.

Present: ROWELL, C. J., TYLER, MUNSON, START, WATSON, HASELTON, and POWERS, JJ.

Opinion filed February 5, 1906.

Bill in Equity—Demurrer—Staleness—Parties—Administrator Representing Creditors—Right of Heir to Maintain Suit—Compromise by Administrator—Sale of Equity of Redemption by Administrator—Effect as Establishing Mortgage.

If the defence of staleness can be interposed on demurrer to a bill in equity, it can be only when the objection appears on the face of the bill.

Where an administrator is made a party in his trust capacity to a suit in equity affecting his decedent's estate, the creditors of the estate are represented and protected.

An heir of an estate, as well as the creditors thereof, may maintain a suit in equity in behalf of the estate, when the administrator declines to act.

The sale by an administrator, under a general license from the probate court, of the estate's equity of redemption in mortgaged real estate, does not establish the validity of the mortgage.

Under the statute authorizing an executor or administrator, with the approbation of the probate court, to compound with a debtor of the deceased, a compromise by the administrator, with the approval of the probate court, of a suit brought by creditors of a decedent to set aside certain mortgages executed by the decedent, does not bar a subsequent suit by heirs of the decedent against same defendant involving transfers of other property by the decedent.

Held, that, because of the inability of the probate court to grant equitable relief, it cannot be said that the law affords a complete remedy in the circumstances disclosed by the bill.

APPEAL IN CHANCERY. Heard on demurrer to the bill at the March Term, 1905, Rutland County, *Powers*, Chan-

cellor. Demurrer sustained, *pro forma,* and bill adjudged insufficient. The orators appeal.

Edward H. Deavitt, and *Harlan F. Stone* for the orators.

The orators have no adequate remedy at law. *Morse et al.* v. *Slason et al.,* 14 Vt. 296; *Wade* v. *Pulsifer,* 54 Vt. 45; *Mann* v. *Mann's Est.,* 53 Vt. 48; *Wetherbee* v. *Chase,* 57 Vt. 253; *Lindsey* v. *Austin,* 60 Vt. 627; *Wilder* v. *Wilder et al.,* 75 Vt. 178; *Missionary Society* v. *Eells et al.,* 68 Vt. 497.

The bill does not show such laches on the part of the orators as entitles defendants to have the bill dismissed. *Payne* v. *Hathaway,* 3 Vt. 212; *Bailey et al.* v. *Bailey et al.,* 64 Vt. 494; *Bailey et al.* v. *Woodbury,* 50 Vt. 166; *Scoville* v. *Brock,* 76 Vt. 385.

E. S. Marsh for the defendants.

Proceedings for the recovery of an estate's misappropriated assets can be maintained only by the administrator, or, in certain circumstances, by the creditors. *Robinson* v. *Swift,* 3 Vt. 377; *Mason* v. *Mason's Ex.,* 76 Vt. 287.

MUNSON, J. This bill is brought to establish and secure certain rights in the estate of Eliza E. Marsh, late of Brandon, Vt., who died intestate, leaving two sons and the two sons of a deceased daughter. The orators are Clarence R. Marsh, one of the sons, and the grandchildren. The defendants are Edward S. Marsh, the other son, E. J. Ormsbee, the administrator of Eliza Marsh's estate, and one Post, surviving partner of Post & Flagg, a firm which is alleged to have received large amounts of the property of the deceased through the instrumentality of Edward, some of which is stated to be still in the possession of the surviving partner.

The bill alleges in substance that the deceased was a widow, whose immediate family consisted of herself and her son Edward; that for some time previous to her death she was mentally weak and susceptible to undue influence; that during this time Edward was her business, financial, and confidential legal adviser; that she formerly had property amounting to one hundred thousand dollars, and was free from debt; that during Edward's management of her affairs this property was so disposed of and incumbered that she died insolvent; that she executed to Post & Flagg mortgages of real estate securing notes of Edward amounting to twenty-four thousand dollars, and conveyances, absolute or conditional, of other real estate, and also transferred to them stocks and bonds; that Edward procured this to be done by an exercise of improper influence and for the purpose of obtaining possession of her property; that said Post & Flagg were New York brokers, through whom Edward bought and sold stocks on speculation, that they were cognizant of Edward's fraudulent methods and purpose and acted in collusion with him, and that the securities placed in their hands were treated as a fund upon which Edward might draw for his own uses.

It appears from further allegations of the bill that Edward was otherwise indebted to the deceased in a large amount, and that he owns certain property described in the bill, but is insolvent; that defendant Ormsbee was appointed administrator *de bonis non* of the estate in March, 1899; that certain banks, for themselves and other creditors of the estate, had before this brought a bill in equity against Edward and the firm of Post & Flagg, alleging that the mortgages executed by Mrs. Marsh to Post & Flagg were fraudulent as to creditors because obtained by the grantees through collusion with Edward, and by means of his undue influence over his mother,

and because given for the purpose of placing the grantor's property beyond the reach of her creditors; that said Ormsbee as administrator, and certain creditors, intervened in said suit, and that Ormsbee was appointed receiver of the income of the mortgaged property; that in December, 1900, said Ormsbee as administrator applied to the probate court for permission to compromise said suit, and that it was compromised with the approval of the court upon terms by which Ormsbee paid to Post & Flagg the balance held by him as receiver, and in his capacity as administrator received from Edward over five thousand dollars, the greater part of which he has since paid out under the orders of the probate court; that the administrator had previously obtained a license to sell all the real estate for the purpose of paying the debts and charges of administration; that none of the heirs joined in the application therefor, or were notified of the hearing thereon otherwise than by publication; that by virtue of this license the administrator conveyed to Post & Flagg the estate's right of redemption in the property covered by said mortgages; that the administrator's account has since been approved, and a dividend declared and paid; and that the administrator has declined to proceed against the other defendants for the benefit of the orators.

The bill prays for a disclosure in detail of all the business transactions had by deceased with said Post & Flagg, either directly or through the said Edward; that the mortgages executed by the deceased to Post & Flagg be decreed to be void; that the land described in certain of said mortgages be declared free of the incumbrance, or that Post be adjudged a trustee of the property for the benefit of the orators and directed to make proper transfer thereof; that defendants Post and Edward S. be decreed to deliver to the administrator all

the property of the deceased in their possession or control; that defendant Edward account for whatever property has come into his possession from the said Eliza or from her estate, and that his property described in the bill be charged with liens to secure the payment of whatever may be found due; and for a writ of sequestration, and an injunction against transfers by either of said defendants.

The bill is demurred to by defendant Edward for the reasons that the orators have no interest in the subject-matter of the suit, and are not proper parties to bring suit; that a former suit based upon the same matters and brought by proper parties was settled; that the validity of the sale and transfer of the real estate under license of the probate court cannot be questioned; that the orators have been guilty of laches in bringing this bill; and that they have an adequate remedy at law.

If the defence of staleness can be interposed by demurrer, it can be only when the objection appears on the face of the bill. For anything that appears here, the orators may have had reason to expect, until shortly before the bill was brought, that the administrator would take action in the matters complained of.

The allegations of the bill show a right in the orators to maintain it. The administrator has refused to sue, and is made a party defendant in his trust capacity. The creditors of the estate are thus represented and protected. All who are interested in what may be left after the payment of the debts and charges are made parties. The right to proceed by suit when the administrator declines to act is not confined to creditors. The right of an heir to maintain a bill in special circumstances is recognized in *Mason* v. *Mason's Exrs.*, 76 Vt. 287, 56 Atl. 1011. Collusion on the part of the administrator

has often been recognized as sufficient to sustain proceedings by an heir; and a refusal to act, from whatever cause, presents the same necessity.

It cannot be said that the law affords a complete remedy in the circumstances disclosed by the bill. The alleged fraud has placed the property beyond the effective administration of the probate court. That court is without power to fasten upon the property or to create liens or enforce transfers.

The sale of the equity in the mortgaged premises under the general license of the probate court did not establish the validity of the mortgages. It is clear that the orators could have some measure of relief as to the mortgaged property without touching the interest obtained from the administrator. Beyond this it is not necessary to inquire.

The statute provides that "an executor or administrator may compound with a debtor of the deceased for a debt due, with the approbation of the probate court, * * " The demurrant insists that the compromise of the suit brought by the banks, with the approval of the probate court, upon the payment of a sum by him to the administrator, is a bar to the maintenance of this bill by the heirs. We think the allegations of the bill are not sufficient to give the settlement the effect claimed. The exact allegation is that the administrator was to receive this sum "in compromise of said suit." When considered in connection with the subject-matter of the former suit, this does not necessarily imply, and perhaps is inconsistent with, an understanding that the money was to be received in full discharge of Edward's liabilities to the estate. In that suit the allegations of undue influence and fraudulent purpose were applied only to the validity of the mortgages given to secure the notes of Edward. The procurement of other property by undue influence, and the liabilities arising therefrom,

are involved in the present proceeding. The allegations are not sufficient to show that the payment was in discharge of all these matters. As this will require the overruling of the demurrer, we do not consider the effect of the settlement of the suit upon the defendants' rights as regards the mortgaged property, nor the conclusiveness upon heirs of settlements approved by the probate court.

Pro forma decree reversed, demurrer overruled, bill adjudged sufficient, and cause remanded.

HOLDEN & MARTIN *v.* JOHN GILFEATHER.

January Term, 1906.

Present: ROWELL, C. J., TYLER, MUNSON, WATSON, HASELTON, POWERS, and MILES, JJ.

Opinion filed February 16, 1906.

Trover—Mortgages—Lien Notes—Contracts—Consideration —Mutual Promises—Repudiation—Statute of Frauds— Mutual Waiver of Conflicting Claims.

While plaintiffs had a valid recorded mortgage of a horse, the mortgagor traded it to defendant, who was ignorant of the incumbrance, for a yoke of oxen upon which he gave defendant a lien note that was never recorded. Thereafter the mortgagor executed to plaintiffs, who knew nothing of the lien note, a mortgage of the oxen to secure their original mortgage debt. Later, after one of the oxen had died, and soon after the last mortgage was recorded, and while plaintiffs were in possession of the other ox under their mortgage, plaintiffs and defendant verbally agreed that plaintiffs would waive their claim to the horse and should have the ox. Subsequently, defendant took the ox from plaintiffs' possession and sold it on his

lien note. *Held*, that defendant is liable in trover for the value of the ox.

Said agreement of mutual waiver was neither executory, nor a sale or exchange of property, but was merely a reciprocal waiver of conflicting claims, whereby the waivers were made effective as soon as agreed upon. Hence, though the ox was worth $40, the agreement was not within the Statute of Frauds.

Said agreement was a valid contract, the mutual promises of the parties being a sufficient consideration.

The taking of the ox by defendant from plaintiffs' possession, coupled with the subsequent sale thereof on his lien note, could not constitute a "repudiation" of said agreement, for there cannot be a repudiation of an executed contract.

Though said agreement is essential to plaintiffs' right to maintain trover for the ox, the suit is not based thereon, but on the title obtained from the mortgagor, perfected by defendant's waiver of his lien.

TROVER for an ox. Plea, the general issue. Trial by court at the September Term, 1904, Windham County, *Start*, J., presiding. Judgment for plaintiffs for $40, which the court found to be the value of the ox at the time of its conversion, and costs. The defendant excepted. The opinion states the substance of the facts found by the court.

Clarke C. Fitts for the defendant.

A mortgage to secure an antecedent debt does not put the mortgagee in the position of a purchaser for value so as to entitle him to prevail over the rights of a defrauded vendor. *Matthews* v. *Kennedy*, 113 Ga. 378; *Vincent* v. *Hansen*, 113 Mich. 173; *Curme* v. *Rauh*, 100 Ind. 247; *Wine Co.* v. *Rhinehart*, 42 Mo. App. 171.

A mortgagee of a conditional vendee is not a *bona fide* purchaser. 46 Neb. 830; 2 Pom. Eq. Jr. § 749; *Bank* v. *Bates*, 120 U. S. 556.

Since the ox was found to be worth $40, the verbal agreement that the plaintiffs would waive their claim to the horse and should have the ox, was within the Statute of Frauds, and inadmissible. *Strong, Whitney & Co.* v. *Dodds,* 47 Vt. 348; *Bank* v. *Grupe,* 36 Hun. 481.

This oral agreement was an executory contract, and cannot be the basis of an action of trover. *Deeley* v. *Dwight,* 132 N. Y. 59; *Tuthill* v. *Wheeler,* 6 Barb. 362; *Whitcomb* v. *Hungerford,* 42 Barb. 177.

Waterman, Martin & Gibson for the plaintiffs.

Defendant is estopped from asserting his claim under his lien note, because of his failure to tell plaintiffs thereof when he asked them to shift their mortgage from the horse to the oxen. *Holman* v. *Boyce,* 65 Vt. 318; *Locklin* v. *Davis,* 71 Vt. 321; *Lindsay* v. *Cooper,* 94 Ala. 170; *Katz* v. *Bedford,* 77 Cal. 319, 8 L. R. A. 735, 736.

MUNSON, J. Plaintiffs held a valid recorded mortgage of a horse, executed by one Phelps. Phelps traded this horse to defendant for a yoke of oxen, without the knowledge of plaintiffs, and without informing defendant of the incumbrance. Defendant reserved a lien on the oxen to secure boot money, but failed to record the lien. A few weeks later, plaintiff Holden told defendant of the mortgage, and defendant wanted plaintiffs to release it. Holden said he would see the oxen, and if it was a fair trade plaintiffs would take a mortgage on the oxen and release the horse. Soon after this, Phelps gave plaintiffs a mortgage of the oxen, conditioned for the payment of the note described in the mortgage on the horse. Five days later, this mortgage was placed on record. After the above interview, at a time not definitely found, one of the oxen died.

Plaintiffs took possession of the remaining ox under their mortgage soon after it was recorded, and a week later defendant took the ox from plaintiffs' possession, and it was sold on the lien before suit was brought. Plaintiffs had no knowledge of defendant's lien until after they had taken possession of the ox. Plaintiffs and defendant had an interview after defendant took the ox and before it was sold, in which it was agreed that plaintiffs would waive their claim to the horse, and should have the ox. In the words of the finding, "defendant repudiated this agreement."

The agreement just stated was found from testimony taken subject to defendant's exception. The evidence is now claimed to have been inadmissible because of the Statute of Frauds. We think the agreement was not a sale of goods within the meaning of the statute. The mutual undertakings were merely waivers of the claims of the respective parties arising out of previous transactions. *Clark* v. *Duffey*, 24 Ind. 271; *Mygatt* v. *Tarbell*, 78 Wis. 351; *Pleasants* v. *Blodgett*, 39 Neb. 741. The defendant's waiver of his claim of a lien on the ox left to the plaintiffs an undisputed right under their mortgage from Phelps. The plaintiffs' waiver of their claim to the horse left the defendant's title to it from Phelps unincumbered. So the finding is based upon evidence properly received, and the agreement is in the case.

The case cannot be disposed of on the ground that the taking of the last mortgage discharged the first. There is no finding that defendant was ever notified that plaintiffs had concluded to make the exchange of securities, and no finding that the mortage of the oxen was in fact taken in pursuance of the talk had in regard to it. The taking of that mortgage was consistent with its being taken to replace the mortgage on the horse, and equally consistent with its being taken to hold

as additional security. We cannot say that its procurement operated as a release of the horse, for the plaintiffs afterwards treated their mortgage upon the horse as a subsisting claim. They were to have the ox and waive their claim to the horse.

The understanding arrived at in the final interview was a valid agreement. The mutual promises of the parties afforded a sufficient consideration. If the taking of the mortgage on the ox was not to be treated as a shifting of security, the plaintiffs' right to the horse was undeniable. The claims arising out of the defendant's failure to record his lien on the ox and the fact that plaintiffs' mortgage of the ox was taken to secure a pre-existing debt, were claims that could be honestly made. See *Wilder* v. *St. Johnsbury & Lake Champlain R. R. Co.*, 65 Vt. 43, 25 Atl. 896. It is to be presumed that the respective positions of the parties were taken in good faith, in the absence of any finding to the contrary. There is no suggestion of any ground upon which the validity of the compromise agreement could be questioned.

The agreement continued in force notwithstanding the attempted repudiation. A repudiation of a contract is something said or done by a contracting party to indicate that he will not perform, or further perform, his contract. It is an essential element of a repudiation that there be something still to be performed by the repudiating party in the future. Wald's Pollock on Contracts, 3d ed. 333. This agreement was not executory. It was nothing but a reciprocal waiver of conflicting claims, and the waivers were effective as soon as agreed upon. It was not an agreement on the part of the plaintiffs that they would discharge their mortgage of the horse on the record, nor an agreement on the part of the defendant that he would bring back the ox and deliver it on the plaintiffs' premises. It was an understanding arrived at to determine the

rights of the parties, and left the results to follow as they might from the rights so determined. The agreement would have barred a further assertion of the plaintiffs' claim to the horse, although not discharged of record. The plaintiffs' right to the ox from the time of the agreement was the same as if it had been in their possession.

The plaintiffs are entitled to maintain trover. As we have seen in disposing of the question of evidence, this was not a sale or exchange of properties. The agreement entered into, although essential to the recovery, is not the basis of the suit. The suit is founded on the title obtained from Phelps, perfected by the defendant's waiver of his lien. A return of the ox would not have been by virtue of a sale from defendant, but as a reinstatement of the possession plaintiffs had taken under their mortgage from Phelps. Defendant's wrong was not a failure to deliver property he had sold, but a tortious appropriation of property left in his possession.

Judgment affirmed.

EDWARD SKINNER *v.* TOWN OF WEATHERSFIELD.

January Term, 1906.

Present: ROWELL, C. J., TYLER, MUNSON, WATSON, and MILES, JJ.

Opinion filed February 16, 1906.

Towns—Highways and Bridges—Injury to Traveller—Notice to Selectmen—Sufficiency—V. S. 3492.

In an action against a town to recover for injuries received by reason of the alleged insufficiency of a certain bridge, it appeared that the

written notice given by plaintiff to the selectmen, in compliance with the requirement of V. S. 3492, stated that on the day named therein plaintiff was "travelling on and over a highway and bridge in said town, * * * said bridge being upon said highway between the dwelling house and the grist mill of Leonard Bailey, and about one hundred feet south-easterly of said dwelling house, and thirty-seven feet south-westerly of the shed attached to said Bailey's grist mill." *Held*, that said notice sufficiently shows that said bridge formed a part of a public highway in said town which it was bound by law to keep in repair.

When the notice fairly informs the selectmen that the highway about which complaint is made is in their town, it sufficiently informs them that it is also a highway which the town is required by law to keep in repair.

White v. *Stowe*, 54 Vt. 510; *Farnsworth* v. *Mount Holly*, 63 Vt. 293, and *Page* v. *Weathersfield*, 13 Vt. 424, distinguished and explained.

CASE for injuries caused by a defective bridge. Plea, the general issue. Trial by jury at the June Term, 1905, Windsor County, *Haselton*, J., presiding. Verdict and judgment for the plaintiff. The defendant excepted. The opinion sufficiently states the notice.

J. C. Enright, and *E. R. Buck* for the defendant.

Davis & Davis, and *John Sargent* for the plaintiff.

The notice is sufficient. *Fassett* v. *Roxbury*, 55 Vt. 552; *Reynolds* v. *Burlington*, 52 Vt. 300; *Ranney* v. *Sheffield*, 49 Vt. 191; *Lawton* v. *Weathersfield*, 74 Vt. 14; *Pratt* v. *Sherburne*, 53 Vt. 370; *Bliss* v. *Whitingham*, 54 Vt. 172; *Babcock et al.* v. *Guilford*, 47 Vt. 519, 523; *Reed* v. *Calais*, 48 Vt. 7; *Halcomb et al.* v. *Danby*, 51 Vt. 428; *Farnsworth* v. *Mount Holly*, 63 Vt. 293; *Cook* v. *Barton*, 63 Vt. 566, 569; *Tinkham* v. *Stockbridge*, 64 Vt. 487; *White* v. *Stowe*, 54 Vt. 510.

The word "highway" means a public road. 1 Rapal. & Law. Dict. 680, 947.

WATSON, J. The only question presented is as to the sufficiency of the notice. The defendant contends that this is defective in that it does not state that the bridge mentioned therein formed part of any public highway which the defendant town was bound by law to keep in repair. The notice is directed to the selectmen of the town of Weathersfield, and states that on the day named the plaintiff was "travelling on and over a highway and bridge in said town, * * * said bridge being upon said highway between the dwelling house and the grist mill of Leonard Bailey, and about one hundred feet southeasterly of said dwelling house and thirty-seven feet southwesterly of the shed attached to said Bailey's grist mill."

It sufficiently appears therefrom that the bridge formed a part of the highway mentioned, and the location of the bridge is very specifically given. A compliance with the statute requires nothing more in this respect to make the notice sufficient. *White* v. *Stowe*, 54 Vt. 510, and *Farnsworth* v. *Mount Holly*, 63 Vt. 293, 22 Atl. 459, are relied upon by the defendant as authorities supporting its contention. But a careful examination of these cases shows that they are not in conflict with the above holding. In the former case the notice did not show the highway where the accident took place to be within the defendant town. The court said the notice "must be so certain in description of time and place as to impose a duty upon the selectmen to investigate the claim. If the notice does not state that the injury happened on a highway that the town was bound to keep in repair, the selectmen would be justified in disregarding it." Construing these two clauses together, manifestly the Court meant by what it said in the latter that the notice must be such as will give the selectmen to understand that the accident was on a highway which the town was required by law to keep in repair. And this it does when

it fairly shows to them that the highway about which complaint is made is in their town. Among others, the same defect was found in the notice in *Farnsworth* v. *Mount Holly,* and in disposing of the case the Court used substantially the same expression regarding the highway being one which the town was bound to keep in repair as is used in the second clause above quoted from *White* v. *Stowe,* but it is used in the same sense and has no other significance. It is urged, however, that there is a distinction between a "highway" and a "public highway," consequently that to use only the term "highway" in a notice does not imply a road which the town is obliged to keep in repair, and we are referred to *Page* v. *Weathersfield,* 13 Vt. 424, as making such distinction. In that case the accident happened on a private way leading to a certain grist mill, and the terms "highway" and "public highway" are used synonymously signifying a way laid out or adopted by the town, as distinguished from a private way opened by individuals for the benefit of themselves and their customers, and which the town could not discontinue, shut up, or control in any way. The case does not have the force claimed for it in argument. In *State* v. *Wilkinson,* 2 Vt. 480, the respondent was indicted for unlawfully erecting a building "in, and upon, a certain public square, and in the common highway there called the public square," in the village of St. Albans. The case was heard in this Court on exceptions taken during the trial and to the overruling of a motion in arrest of judgment. It appears that whether a way created as the one there in question was, imposed upon the town the charge of keeping it in repair, was a point much argued. It was held that if the *locus in quo* was a highway, it was a franchise belonging to all the people, and an indictment would lie for any obstruction of it. The Court said: "A highway, according to the common law, is a

place in which all the people have a right to pass. A common street and public highway are the same, and any way, which is common to all the people, may be called a highway." The exceptions were overruled. And in *French* v. *Barre,* 58 Vt. 567, 5 Atl. 568, it is said that all highways, whether open roads, cross-roads, lanes, or pent roads, are public highways.

Judgment affirmed.

JOHN W. MATHIE *v.* JOHN E. HANCOCK.

January Term, 1906.

Present: ROWELL, C. J., MUNSON, WATSON, HASELTON, POWERS, and MILES, JJ.

Opinion filed February 16, 1906.

Implied Contracts—Quasi Contracts—Volunteers—Liability of Administrator for Services Rendered Before His Appointment.

To render a person liable on a promise implied in fact, it must appear that he assented to the obligation.

Liability on a *quasi* promise, or promise implied in law, exists irrespective of intention, and may flow either from the doctrine that one shall not be allowed to enrich himself unjustly at the expense of another; or from the doctrine that where an obligation is imposed by law upon one to do an act because of an interest in the public to have it done, and that one fails to do it, he who does do it, expecting compensation, may recover therefor of him on whom the obligation is imposed.

No inferences can be drawn by the court from agreed facts, because the agreement is the voluntary act of the parties.

In assumpsit against an administrator, the agreed statement showed only that before and at the time of his death defendant's testate was living on the town farm as superintendent thereof, and that plaintiff resided with him and was engaged in breaking horses of his own and horses of the testate; that after the death of said testate, the overseer told plaintiff that the town would neither care for the testate's horses nor furnish them food; that thereafter plaintiff fed and cared for said horses till they were taken by defendant as administrator, which was as soon as he was appointed and qualified as such. *Held*, that, for aught that appears, plaintiff was a mere volunteer who expected no compensation, and therefore, he is not entitled to recover.

The defendant was under no duty in respect of the horses during the time in question, for he was not administrator, and did not know, so far as appears, and had no interest to know, either the condition of things or what plaintiff was doing.

GENERAL ASSUMPSIT. Heard on an agreed statement at the March Term, 1905, Orleans County, *Tyler*, J., presiding. Judgment for the defendant to recover his costs. The plaintiff excepted. The opinion states the case.

Horace F. Graham for the plaintiff.

Defendant is liable as on a quasi-contract. Plaintiff performed for defendant a duty which was imposed on him by the law, and which he neglected to perform. Keener Quasi-Contracts, 341; *Jenkins* v. *Tucker*, 1 H. Bl. 90; *Ambrose* v. *Kerrison*, 10 C. B. 776; *Bradshaw* v. *Beard*, 12 C. B. 344; *Patterson* v. *Patterson*, 59 N. Y. 574; *Cunningham* v. *Reardon*, 98 Mass. 538; *Chase* v. *Corcoran*, 106 Mass. 286.

Taylor & Dutton for the defendant.

There is no rule of law or equity which obliges an administrator to pay for work which he has not ordered and which has not been done for him. *In re Watson*, 19 Q. D. C. 234; *Luscomb* v. *Ballard*, 5 Gray 403, 66 Am. Dec. 374.

Plaintiff did not act by reason of anything which defendant did, or omitted to do; so, as to defendant, he stands as a mere volunteer. *Kattman* v. *San Francisco,* 20 Cal. 96, 81 Am. Dec. 96; 15 Am. & Eng. Enc. Law 1083; *State* v. *St. Johnsbury,* 59 Vt. 332; *Manning* v. *Leighton,* 65 Vt. 84; *Walton* v. *Hall's Est.,* 66 Vt. 463; *Shaw* v. *Hallihan et al.,* 46 Vt. 389; *Mathews, Admr.* v. *Mathews,* 56 Ala. 292.

ROWELL, C. J. This is general assumpsit. The facts, as agreed upon by the parties, are these: The defendant is administrator of the estate of one Niles, which is in process of settlement in the probate court. Before and at the time of his death, Niles lived upon and carried on the town farm of the town of Hardwick, most of the cows on which belonged to the town. Immediately after Niles's death, the overseer of the poor, who was also superintendent of the farm, took possession of the farm and the cows. For some time before the death of Niles, the plaintiff made it his home with him on the farm, and was engaged in handling and breaking horses of his own, and horses belonging to Niles and to others, and was so engaged at the time of Niles's death. When the overseer took possession of the farm, he told the plaintiff that the town would not care for the intestate's horses, nor furnish hay nor grain for them; and the plaintiff fed them on hay and grain, and exercised them, until they were taken possession of by the defendant as administrator, which, as we understand from the briefs, was as soon as he was appointed and qualified as such. A portion of the feed so used by the plaintiff, belonged to Niles at the time of his death, and when that was gone, the plaintiff furnished all the feed for the horses. The defendant denies all liability, and refuses to pay the plaintiff for said care and feed; but if the plaintiff is entitled to recover therefor, it

is agreed that he shall have judgment for twenty-five dollars and costs.

It is not claimed that here is an express promise. Nor is there an implied promise in fact, for the defendant's assent does not appear, and that is essential to such a promise. If liability exists, therefore, it must be by virtue of a quasi promise, an implied promise in law, founded either on the doctrine that one shall not be allowed to enrich himself unjustly at the expense of another; or on the doctrine that when an obligation is imposed by law upon one to do an act because of an interest in the public to have it done, and that one fails to do it, he who does do it, expecting compensation, may recover therefor of him on whom the obligation is imposed.

The latter is the ground on which the husband is liable at common law for the expenses of his wife's funeral—*Jenkins* v. *Tucker,* 1 H. Bl. 90; and, in some jurisdictions, executors and administrators, for the expenses of the decedent's funeral. *Patterson* v. *Patterson,* 59 N. Y. 574. But in this State such expenses are debts against the estate, and, after paying the necessary expenses of administration, are preferred above all other debts. V. S. 2503.

The former is the ground on which the owner of lost goods is bound to pay the finder for the money he necessarily laid out and expended in and about the matter, if he takes the goods from the finder; but not otherwise, it would seem, for then he would not be benefited by the finder's outlay. *Chase* v. *Corcoran,* 106 Mass. 286; Keener, Quasi Cont. 357.

The plaintiff was in the service of the intestate at the time of his death only to the extent of handling and breaking horses for him. It does not appear that it was necessary for him to feed and exercise them after the testator's death in order to preserve them, for it does not appear that there was no one

else to do it. True, the town refused, but for aught that appears those interested in the estate could have done it or procured it to be done. At all events it does not appear that they could not. Nor can it be said that the horses were left in the defendant's possession so that it cast any duty upon him to care for them on the ground of humanity nor otherwise. Hence, for aught that appears, he was a mere volunteer in the matter; nor does it appear that he expected compensation, and that cannot be inferred, for no inference can be drawn by the Court from agreed facts, because the agreement is the voluntary act of the parties, the same as is the creation of a board of arbitrators or of referees, from whose findings no inferences can be drawn, because they are a court of the parties' own creation. *Kimball* v. *Estate of Baxter,* 27 Vt. 628; *Darby* v. *National Bank,* 57 Vt. 370.

Nor was the defendant under any duty in respect of the horses during the time in question, for he was not administrator, and did not know, so far as appears, and had no interest to know, the condition of things, nor what the plaintiff was doing. If the defendant had paid the plaintiff, it would be for the probate court to say whether he should be allowed therefor in his administration account. The defendant, therefore, is not liable on the second ground above stated. Nor is he liable on the first ground, notwithstanding the estate may have been benefited, for the plaintiff was a volunteer, and that defeats him, however it might be if he were not.

In the *Matter of Watson,* ex parte *Phillips,* 19 Q. B. D. 234, Watson, during a period in which there was no personal representative of the estate of a deceased testatrix, and acting upon the instructions of one Eaton, a relative of the deceased, who had no authority in the premises, did work as a solicitor in respect of the administration and for the benefit of the es-

tate. Subsequently the respondent Phillips obtained letters of administration *de bonis,* and refused to pay Watson; and it was held by the Court of Appeals, affirming the decision of the Queen's Bench Division, that he was not bound to pay, because the work was not performed under any contract with him. The Court said that Watson was a mere volunteer as far as the administrator was concerned, and must look to Eaton for payment, and that there was certainly no rule of law nor principle of equity that obliges an administrator to pay as administrator for work that he did not order and was not done for him. To the claim that as the work was beneficial to the estate, and Phillips as administrator had received that benefit, it would be unconscientious in him not to pay for it, the Court said if that was so, which it doubted, it would not make new law in order to compel people to do that which they were bound in conscience to do.

In *Luscomb* v. *Ballard,* 5 Gray, 403, 66 Am. Dec. 374, it was held that an executor cannot be charged in any capacity for services beneficial to the estate, rendered before his appointment and without his assent, under contracts with a special administrator and with an executor named in the will but who declined the trust.

Judgment affirmed.

HOWARD & BROWN *v.* H. P. GAMMON AND TRUSTEE AND CLAIMANT.

January Term, 1906.

Present: ROWELL, C. J., TYLER, MUNSON, WATSON, POWERS, and MILES, JJ.

Opinion filed February 16, 1906.

Justices of the Peace—Trustee Process—Judgment for Claimant—Appeal—V. S. 1298.

The claimant in a trustee suit, as to the merits of his title to the credits disclosed by the trustee, is a party to the suit, within the meaning of V. S. 1298, allowing an appeal from the judgment of a justice in a civil case by "either party."

The plaintiff in a trustee suit is entitled to an appeal from the judgment of a justice sustaining the claimant's title to the credits disclosed by the trustee and discharging the trustee, when the amount in issue between the plaintiff and the claimant exceeds twenty dollars, though the suit is not appealable as between the plaintiff and the defendant.

DEBT ON JUDGMENT. Heard at the June Term, 1905, Windsor County, *Haselton,* J., presiding, on the claimant's motion to dismiss the appeal for that "neither the *ad damnum* in plaintiff's writ, nor the sum demanded in the declaration, nor the specifications or exhibits of plaintiff exceeded the sum of twenty dollars." Motion overruled. The claimant excepted.

The *ad damnum* in the writ, and the sum demanded by the declaration, is twenty dollars; and neither the specifications nor exhibits of plaintiffs at the trial before the justice exceeded that sum. The trustee disclosed at said trial that at the time the original writ was served on him he owed defendant $75. At said trial, Valeria B. French appeared as claimant of said

fund. Trial was duly had and resulted in judgment that said "claimant is entitled to said fund in the hands of the trustee, and that the trustee be discharged." From this judgment the plaintiffs were allowed an appeal.

Sanford E. Emery and *Davis & Davis* for the claimant.

A. H. Humphrey and *Stickney, Sargent & Skeels* for the plaintiffs.

Whatever grounds may have existed in support of a motion to dismiss were waived by the entry of a general appearance. *Bennett* v. *Stickney,* 17 Vt. 531; *Huntley* v. *Henry,* 37 Vt. 165; *Mack* v. *Lewis,* 67 Vt. 383.

ROWELL, C. J. The question is whether the plaintiff in a trustee suit can appeal from the judgment of a justice sustaining the claimant's title to the credits disclosed by the trustee and discharging the trustee, although the suit is not appealable as between the plaintiff and the defendant, the amount in issue between the plaintiff and the claimant exceeding twenty dollars.

That a trustee can appeal when the amount in issue between him and the defendant exceeds twenty dollars, although the action is not appealable as between the plaintiff and the defendant, has been decided. *Church* v. *French,* 54 Vt. 420; *American Express Co.* v. *Gray,* 62 Vt. 421, 20 Atl. 276. It is said in the *Church* case that it was undoubtedly the intention of the statute to place trustees upon perfect equality with the principal parties in respect of appeals; that if in that case, suit had been brought by the defendant against the trustee directly, the trustee would have had a right to appeal, and that when compelled to litigate the same matter as trustee, he should have the same right, and that a proper construction of the statute

gave it to him. It is said in the *Express Company* case that the contention that the only question was, whether the amount in controversy between the plaintiff and the defendant exceeded twenty dollars, could not be acceded to without overruling the *Church* case, which the court was not disposed to do.

It is said in *Van Buskirk* v. *Martin,* 28 Vt. 726, that it was the purpose and intention of the act allowing trustees to appeal in respect of their liability, to put them on the same ground as the other parties to the suit, and that the act would have been "a very one-sided affair" had it extended the right of appeal to the trustee and denied it to the plaintiff, who litigated the question with the trustee.

The claimant can appeal, because, as to the merits of his title, he is a party to the suit, within the meaning of the statute allowing an appeal by "either party." *Hutchinson* v. *Bigelow,* 23 Vt. 504. In the case at bar the claimant could have appealed had the judgment been against her, because the amount in issue between her and the plaintiff exceeded twenty dollars, as that amount was the amount of the plaintiff's judgment, there being funds enough in the trustee's hands to pay that judgment in full; and as said of the act allowing a trustee to appeal, so it may be said of the statute allowing a claimant to appeal, it would be a very one-sided affair to extend the right of appeal to the claimant and deny it to the plaintiff, the party contending against the claimant's title. Nor can the plaintiff's right of appeal be tested by the right as between the principal parties, any more than the trustee's right can be thus tested. The intent of the statute is, to put the claimant and the plaintiff on perfect equality in regard to appealing from a judgment respecting the claimant's title, and the test is, the right of appeal as between them, and that right is mutual; if one can appeal, the other can. This is the only fair con-

struction of the statute. It would take clear language to warrant a different construction.

Judgment affirmed.

DAVID COMOLI *v.* STATE OF VERMONT.

January Term, 1906.

Present: ROWELL, C. J., TYLER, MUNSON, WATSON, and MILES, JJ.

Opinion filed February 16, 1906.

Petition for New Trial—Newly Discovered Evidence—Affidavits—Sufficiency—Allegations of Due Diligence.

The statement, in affidavits accompanying a petition for a new trial based on newly discovered evidence, that the affiants "used due diligence" seasonably to obtain such evidence, is mere opinion, and insufficient to show the requisite diligence.

The newly discovered evidence revealed by affidavits attached to a petition for a new trial in behalf of one convicted of a simple assault, *held* not likely to produce a different result on another trial.

PETITION for a new trial, brought under V. S. 1662, to the Supreme Court for Washington County at its January Term, 1906, and then heard on petition and affidavits thereto attached. At the September Term, 1905, of Washington county court, the petitioner was convicted of a simple assault, upon an indictment for an assault with intent to kill one Mary Broggi. The newly discovered evidence relied upon is set forth in the affidavit of Lena Whitney which is attached to the petition.

John N. Harvey for the petitioner.

S. Hollister Jackson, State's Attorney, for the State.

ROWELL, C. J. It is considered that the newly discovered evidence attached to the petition would not be likely to produce a different result on another trial.

It is also considered that the affidavits thereto attached do not show the requisite diligence. They state only that the affiants "used due diligence," which is only an opinion, upon which the Court cannot act. They should have stated the facts, that the Court might judge of the matter.

Petition dismissed.

FRANK P. RUSS *v.* CENTRAL VERMONT RAILWAY CO.

October Term, 1905.

Present: ROWELL, C. J., TYLER, MUNSON, HASELTON, and POWERS, JJ.

Opinion filed February 16, 1906.

Master and Servant—Railroads—Collision—Injury to Engineer—Competency of Engineer—His Familiarity with Road—Evidence—Sufficiency—Question for Jury.

In an action for injuries received by a railroad engineer while on his engine on a siding at a station, by being run into by an engine in charge of another of defendant's engineers, and which was running extra from the south with orders to meet plaintiff's train at said station, evidence examined, and *held* that it cannot be said, as matter of law, that either plaintiff or any of his train crew was negligent in respect of the open switch.

Therefore, though the colliding engine was in charge of an experienced engineer, yet, as it appeared that he had made only a few trips over that section of the road, and plaintiff's evidence tended to show that defendant knew just what opportunity said engineer had to become familiar with the line, and tended to show that an engineer comes to know his location, when not able to see, by the bridges he has passed, the distance he has traversed, the swing of his engine at curves, etc.; that there was a dense fog at the time of the accident; that the rules required said engineer to stop south of the south switch at said station; that he approached the yard without sounding the required whistle, made no stop, and came upon the switch and to the point of collision at a speed of from 15 to 20 miles an hour; plaintiff was entitled to argue to the jury that said engineer's failure to stop was not due to his negligence, but to his lack of familiarity with the road, and that defendant was negligent in not requiring him to have more knowledge of the road before undertaking the duties of an engineer; and so, it was error to order a verdict for defendant.

CASE for negligence. Plea, the general issue. Trial by jury at the December Term, 1904, Windsor County, *Watson*, J., presiding. Verdict ordered for the defendant to recover its costs; and judgment thereon. The plaintiff excepted.

William Batchelder, and *Plumley & Plumley* for the plaintiff.

Hunton & Stickney for the defendant.

MUNSON, J. A verdict for the defendant was directed at the close of the plaintiff's evidence.

The plaintiff, engineer of train 32, was injured while on his engine on a siding in the Northfield yard, by being run into by an engine in charge of one Curotte, which was running extra from the south with orders to meet No. 32 at Northfield. Curotte was an experienced engineer from another section, who had recently been engaged in instructing defendant's

engineers in handling a type of engines new to the road. While doing this he was himself being instructed in and observing the physical features of the road and its margins, with a view to being regularly employed on the line. He had subsequently made a few trips over the road as engineer, and was so running on this occasion.

The evidence of the plaintiff tended to show that an engineer comes to know his location, when not able to see, by the bridges he has passed, the distance he has travelled, the swing of the engine at curves, and the differences in sound; that the defendant had the means of knowing just what opportunity Curotte had had for becoming familiar with the line; that there was a dense fog at the time of the accident; that the rules required Curotte to stop south of the south switch; that he approached the yard without sounding the required whistle, made no stop, and came upon the switch and to the point of collision at a speed of from fifteen to twenty miles an hour. This was evidence upon which the plaintiff was entitled to argue to the jury that Curotte failed to stop because he did not know where he was; that this was not due to negligence but to lack of familiarity with the road; that prudence required that one have more knowledge of the road before undertaking the duties of an engineer, and that the defendant was negligent in putting Curotte upon this service with the knowledge he had.

So a verdict for the defendant could not be directed, unless it could be said as matter of law that the plaintiff was chargeable with negligence as regards the switch.

All that can be said definitely about the switch is that it must have been open at the time of the accident, for it threw Curotte's engine upon the siding, and that it must have been in place about fifteen minutes before when a train went through

on the main line. There was no direct evidence as to when or by whom it was opened. The crew of No. 32 had been shifting cars in the south part of the yard, on tracks leading to the south switch, before the plaintiff came to the engine, and continued to do so until the accident occurred. The testimony of the plaintiff tended to show that there was another crew that was or had been doing work in the yard, but he did not know that they had anything to do in the south part of the yard, and thought that they did not have. There was no further evidence touching the presence or possible action of anyone not belonging to plaintiff's crew. There was no evidence tending to show that any member of that crew, or other fellow servant of the plaintiff, had been to the switch prior to the incident hereafter related.

The "hostler" who had brought out the engine while plaintiff was at breakfast, and was handling it while the plaintiff was at work on the lubricator, testified during his cross-examination by defendant's counsel, that shortly before the collision a trainman going south past the engine "said he was going up to flag and throw a couple of cars in the train." This is all that we know of the trainman, his orders or his movements.

It appears from the record that the rulings which brought this evidence into the case were made upon an understanding that the trainman delivered some order to the witness, and that the answer obtained was not in accordance with the limitations imposed by the court. Exceptions were taken as the questions were asked and rulings made, but no exception was taken to the answer. The plaintiff now complains of the fact that the court finally treated the answer as in the case and of the effect given it, while the defendant insists that the plaintiff has no exception that can avail him. The legal admissibility of the

evidence is not argued by either side. We shall proceed with the consideration of the case upon the assumption that this evidence is properly before us.

The trainman's statement cannot be considered an order from the conductor to the engineer. It was not that in form, and it sufficiently appears from the evidence that it was not that in fact. The engineer continued to look to the conductor for signals, and did nothing except upon the conductor's motion. It was the theory of counsel, however, as stated in urging the admissibility of the evidence, that the purpose of the conductor was communicated to the engineer in order that he might know how far he was to go ahead when ordered to do so. But this can hardly be the explanation, for the work done subsequent to the communication involved at least two forward movements which were stopped short of the switch on the conductor's motion, and just before the accident occurred the engineer had received a signal to back. There is certainly nothing in the above theory that serves to reconcile the implications contained in the trainman's statement with the evidence hereafter referred to regarding the work of the train.

It appears from the record that in disposing of the case the court treated this movement and remark of the trainman as sufficient proof that the switch was then open, and that the fact was known to the conductor and the acting engineer. This view was doubtless impressed upon the court by some answers of the witness which indicated that the collision occurred very soon after the trainman passed. But when all the testimony of the witness is taken together, it may be doubted if the part relating to the trainman tended to show that the switch was open at that time. When the several movements executed after the trainman passed are considered, the evidence in question seems rather to suggest that the trainman himself opened

the switch in the interval that elapsed between his passing and the occurrence of the accident.

The court considered that the only conclusion that could fairly be drawn from the evidence was that the switch was opened by some one of the trainmen of No. 32 before the trainman referred to passed the engine. But we think there was evidence in the case which precluded the direction of a verdict upon that ground. We have suggested that some circumstances point to the trainman who passed the engine as the one who opened the switch; but if such an inference could have been drawn by the court from uncontradicted evidence, we think it could not have been done with the case standing as it did.

The statement of the trainman, as presented by the testimony of the witness, implied that the conductor had given an order which required the use of the south switch in the work of making up the train. This statement, so presented, was the only evidence in the case that tended to show that the work of the train required that use. All the other evidence tended to show that the work of the train was confined to the sidings on the west side of the main line. The plaintiff testified that the work of making up the train was not completed when the accident occurred, that there had been no occasion for them to use the south switch, and would have been none until they went out onto the main line to leave, and that he could not do this without going to the telegraph office and getting his clearance. In this condition of the evidence, we do not think that the court could assume the truth of the testimony regarding the trainman's statement. Nor do we think that the proximity of the crew of No. 32, and the absence of evidence of the proximity of other persons, were sufficient to fasten the

opening of the switch, as matter of law, upon some member of that crew.

As this will require a reversal of the case, it is not necessary to consider the plaintiff's claim that he had a right to rely upon the rule requiring extra trains to come to a stop south of the south switch, and that it is therefore immaterial when or by whom the switch was opened. Nor is it necessary that we determine the meaning and application of the printed rules relating to the duties of trainmen when using a switch; and in view of the number and variety of the rules that were submitted, and the technical terms contained in them, we do not deem it wise to undertake their construction at this time, but think it better to leave to the court below the construction of whatever rules may be pointed out on another trial as applicable to the case as it may then be presented.

Judgment reversed and cause remanded.

LOUIS BUSHEY *v.* P. B. B. NORTHROP.

January Term, 1906.

Present: ROWELL, C. J., MUNSON, WATSON, and POWERS, JJ.

Opinion filed February 16, 1906.

Assumpsit for Labor—Misconduct of Counsel—Argument—Unwarranted Assumption—Reversible Error.

In assumpsit for labor, it appeared that defendant gave plaintiff, who could not read, a check for $5 on which was written, "Balance in full to date." Plaintiff cashed the check and testified that the balance due him was $36 and that some time later defendant drew a

check for $18 and offered it to plaintiff in full settlement, and that plaintiff refused to receive it. Defendant testified that he called plaintiff's attention to what was written on the $5 check, and told him that, if he accepted it, it would be in full settlement of his claim, and denied that he drew and offered plaintiff the $18 check. *Held*, that the question asked the jury by plaintiff's counsel in argument, "What is the feeling towards an intelligent man who takes advantage of a poor man's ignorance?" though unwarranted by the evidence, and based upon an assumption of defendant's misconduct was not, in the circumstances, reversible error.

Where plaintiff gave defendant notice before trial to produce the stubs of all checks drawn by him between certain dates and also all checks then in his possession, but defendant complied by producing only three checks, claiming that his stub books were lost, plaintiff's counsel was justified in arguing that defendant had failed to produce papers that were or ought to have been in his possession, and that it might be inferred therefrom that there was something wrong in the transaction.

GENERAL ASSUMPSIT for labor performed. Pleas, the general issue, payment, accord and satisfaction. Trial by jury at the September Term, 1905, Franklin County, *Tyler*, J., presiding. Verdict and judgment for the plaintiff. The defendant excepted. The opinion states the case.

Hogan & Hogan for the defendant.

Plaintiff's counsel violated the rules of legitimate argument and thereby prejudiced the jury against the defendant, and for this the case should be reversed. *Smith Woolen Machine Co.* v. *Holden*, 73 Vt. 396.

C. G. Austin & Sons for the plaintiff.

The argument in question was legitimate. Counsel have a right to comment upon the conduct of a party bearing upon the good faith of his claim. *Amsden* v. *Atwood*, 69 Vt. 532; *Ranchau* v. *Rutland R. R. Co.*, 71 Vt. 148; *Magoon* v. *B. &*

M. R. R. Co., 67 Vt. 177; *Boyden* v. *Fitchburg R. R. Co.*, 72 Vt. 89; *Blaisdell & Barron* v. *Davis*, 72 Vt. 309; *Smard* v. *Garlin et al.*, 33 Vt. 593; *Beattie* v. *Grand Trunk Ry. Co.*, 41 Vt. 275; *McCabe* v. *McCabe*, 73 Vt. 175; *Rea* v. *Harrington*, 58 Vt. 190.

MUNSON, J. The only questions presented are two concerning the argument, but these require some statement of the case.

It appears that plaintiff quit defendant's employment before his time was out, and went to defendant for his pay, and that some claim of damages was made; that defendant finally gave plaintiff a check for five dollars, on which was written "balance in full to date"; and that plaintiff got the check cashed. Plaintiff testified that the balance due him on his wages was thirty-six dollars; that defendant gave him the five dollar check towards his services, and agreed to pay the balance when his time was out; that he could not read, and was not told by defendant, and did not know, what was written on the check; that some time later he applied to defendant for the balance of his wages, and that defendant then drew a check for eighteen dollars and offered it to him in full settlement, and that he refused to accept it. Defendant testified that he called plaintiff's attention to what was written on the five dollar check, and told him that if he took the check it would be in full settlement of his claim; and that no check was afterwards drawn or offered.

In his argument to the jury plaintiff's counsel asked, "what is the feeling towards an intelligent man who takes advantage of a poor man's ignorance?" and spoke of defendant's conduct as contemptible. This was a characterization of the defendant upon an assumption of his misconduct, rather

than an argument of the evidence to prove the misconduct; but the case presented by the plaintiff's testimony justified some severity of remark, and it can hardly be held that the mistake indicated was reversible error.

Before the trial plaintiff gave defendant notice to produce the stubs of all checks drawn by him between certain dates, and all of the checks that were in his possession. The exceptions say that defendant did not comply with this notice, except to produce the five dollar check and two previous checks cashed by plaintiff, and that he claimed his stub-books were lost. Plaintiff's counsel argued that defendant had failed to produce papers that were or ought to have been in his possession, and that it might be inferred from this that there was something wrong in the transaction. The case afforded a sufficient basis for the argument.

Judgment affirmed.

STATE *v.* BARNEY McMANUS.

January Term, 1906.

Present: ROWELL, C. J., TYLER, MUNSON, WATSON, HASELTON, POWERS, and MILES, JJ.

Opinion filed February 16, 1906.

Forgery—Invalid Instruments—Liquor Prescriptions.

A document which is invalid on its face cannot sustain a charge of forgery at common law.

Since § 22, No. 115, Acts 1904, authorizes licenses to sell intoxicating liquor for medicinal purposes, and § 24 provides that such licensees

shall sell only on a written prescription of a legally qualified physician, which shall state, among other things, that it "is given and necessary for medicinal use," a prescription containing no statement that the liquor prescribed is necessary for medicinal use is invalid on its face and, therefore, the alteration thereof cannot constitute forgery at common law.

INDICTMENT for forgery. Heard on demurrer to the indictment at the September Term, 1905, Washington County, *Rowell,* J., presiding. Demurrer overruled, *pro forma,* and indictment adjudged sufficient. The respondent excepted.

Senter & Senter for the respondent.

At common law, an intent to defraud is essential to constitute the crime of forgery. *State* v. *Redstrak,* 29 N. J. L. 365; *Rex* v. *Hodgson,* (Dears & B. 3) 5 Law Crim. Def. 7; *State* v. *Ward,* 7 Baxt. 776; *Barnum* v. *State,* 15 Ohio 717 (45 Am. Dec. 601); *Com.* v. *Mulholland,* 5 W. N. C. (Pa.) 208; *State* v. *Givens,* 5 Ala. 747; *People* v. *Tomlinson,* 35 Cal. 503; *Waterman* v. *The People,* 67 Ill. 91; *Rex* v. *Closs,* 5 Crim. Defs. 46; *Rex* v. *Smith,* 5 Law Crim. Defs. 17; *Brown* v. *The People,* 86 Ill. 239.

An information charging forgery at common law must allege that the intent and purpose of the respondent was to deceive and defraud, and must name the person intended to be defrauded, or if such person is unknown, then that fact must be stated. Bishop's Dir. & Forms, § 457; Bishop's New Crim. Law, § 4 w; Arch. Crim. Pr. and Pl. 1566 and note; Wharton's Crim. Law, § 743 a.

Where the instrument is invalid on its face it cannot be the subject of forgery. *People* v. *Shall,* 9 Cowen 778; 5 Law. Crim. Defs. 64-76; 2 Bish. New Crim. Law, § 538.

S. Hollister Jackson, State's Attorney, for the State.

MUNSON, J. The information charges the respondent with committing the crime of forgery by altering a physician's prescription for whiskey. The alteration alleged is the change of one to four in the designation of the quantity. It is not claimed that the alteration of such an instrument is forgery under our statute. The question is whether the information is good at common law.

Section 22, No. 115, Acts of 1904, authorizes licenses to sell intoxicating liquors of any kind for medicinal purposes. Section 24 of the act provides that such licenses shall be issued only to retail druggists and apothecaries who are registered pharmacists; and provides further that the holder of such a license shall sell only upon the written prescription of a legally qualified physician, which shall state, among other things, that it "is given and is necessary for medicinal use."

The respondent urges that the instrument alleged to have been altered was so defective that its alteration would not be forgery. Of the several defects claimed we shall notice but one, as to which there is no room for argument. The prescription in question contains no statement that the liquor prescribed is necessary for medicinal use. It therein fails to comply with the statute in a very essential particular. The paper is invalid upon its face, and could not be relied upon as authority for a sale. This has been held in respect to similar provisions in other states. *State* v. *Titrick*, 34 W. Va. 137; *State v. Nixdorf*, 46 Mo. App. 494.

It has been long and uniformly held that a paper that is invalid on its face will not sustain a charge of forgery at common law. The writing must be such that if genuine it would be apparently of some legal efficacy. It is not to be presumed that any one could be deceived or defrauded by a document that is void on its face. 2 Bish New C. Law. § §

523, 524 (3), 538; *State* v. *Briggs*, 34 Vt. 501; *People* v. *Hall*, 9 Cow. 778.

Pro forma judgment reversed, demurrer sustained, information quashed, and respondent discharged.

PATRICK POWERS *v.* GRAND TRUNK RAILWAY CO.

January Term, 1906.

Present: ROWELL, C. J., TYLER, MUNSON, WATSON, POWERS, and MILES, JJ.

Opinion filed February 16, 1906.

Negligence—Railroads—Crossings—Duty of Engineer—Escape of Steam—Frightening Horses.

In an action against a railroad company for injuries received by being thrown from a wagon on a crossing, in consequence of the horse having become frightened by escaping steam as plaintiff drove by defendant's locomotive which was slowly approaching said crossing, evidence examined and *held* that there is nothing therein tending to show either that the escape of steam was unnecessary, or that the engineer did not see the team as soon as he should, or that he did not stop the engine and the escape of steam as soon as possible after discovering the team, and that, therefore, the court correctly ordered a verdict for defendant.

CASE for negligence. Plea, the general issue. Trial by jury at the March Term, 1905, Essex County, *Haselton*, J., presiding. Verdict directed for the defendant, and judgment thereon. The plaintiff excepted.

Herbert W. Blake for the plaintiff.

L. L. Hight, and *Harry B. Amey* for the defendant.

MUNSON, J. The engine of which the plaintiff complains was passing slowly, in a westerly direction, from the turn-table at the round-house in defendant's yard at Island Pond to the first side-track, to be attached to a train. The road upon which the plaintiff was travelling, tracing it from the east, crossed the track on which the engine was running just west of the round-house, ran close beside the track on the right hand side some over a hundred feet, and then turned directly across it. The entire length of the track from the turn-table to the second crossing was about three hundred feet. The wagon in which plaintiff was riding was going in the same direction as the engine, went over the first crossing after the engine had passed, overtook and passed the engine on the section between the two crossings, and was wrecked on the first rail at the further edge of the second crossing; the engine being brought to a stop when it covered about one-quarter of the crossing. The horse was frightened by escaping steam as it came up with the engine, thereupon hastened its speed despite the efforts of the driver, and came upon the crossing in the manner indicated. It is claimed that the defendant was negligent in permitting the steam to escape. At the close of all the evidence a verdict was directed for the defendant. The defendant stands solely upon the ground that there was no evidence tending to show negligence on its part.

The engineer testified that as he approached the crossing he was in his place on the right side of the engine, with his head out of the cab window, and looking forward; that there was an escape of steam from the cylinders; that he did not see the team until it got right under, or a little forward of, his cab window, and that as soon as he saw it he stopped the

engine. Plaintiff's attorney cross-examined the witness as to when the cylinder cocks were opened and when closed, and there was some confusion in his answers as first given; but on a final cross-examination as to his meaning the witness testified that the cylinder cocks were open from the time he left the turn-table until he saw the team, and that as soon as he saw the team he shut them off, and opened them again after the engine had stopped.

The plaintiff's evidence tended to show that as they were driving past the tender or engine the steam burst out suddenly from the cylinders with a loud noise, and came against the horse. The boy whom the plaintiff was holding in his lap said this occurred when they got along near the engine—beside the engine, and when asked later "if it was when they were even with the engine," replied "Yes, pretty near." The driver of the team testified that there was no steam down around the wheels until he got about opposite the engine; that he didn't notice any until then. The plaintiff testified that this burst of steam was just as they got up to the tender, and that the horse plunged right through it. The length of the tender was twenty-five feet, and that of the engine and tender as coupled sixty-four feet.

The foreman of engineers testified in substance that the cylinder cocks are controlled from the cab; that their office is to relieve the cylinders of the water resulting from condensation; that when an engine stands even a short time steam condenses in the cylinders; that when an engine comes from the round-house the pipes are cold and there is much condensation; that it is necessary to leave the cocks open for a considerable time after starting to get rid of the water; that the discharge consists of water and steam, being nearly all water at first, containing afterwards a greater amount of steam, and

becoming all steam when the condensation is fully relieved; that the final change to an escape of steam only is ordinarily quite sudden. This testimony was uncontradicted.

We find nothing in the evidence that required a submission of the case. It was unquestionably the duty of the engineer to be looking ahead as he approached the crossing. There is no evidence tending to show that he did not see the team as soon as he could be expected to while performing this paramount duty. There is none tending to show that he did not stop the engine and the escape of steam as soon as possible after discovering the team. There is nothing that tends to show that the escape of steam which frightened the horse was outside the ordinary operation of an engine, or was unnecessary.

Judgment affirmed.

DUNNETT & SLACK *v.* MARTIN H. GIBSON.

January Term, 1906.

Present: ROWELL, C. J., TYLER, WATSON, HASELTON, POWERS, and MILES, JJ.

Opinion filed February 21, 1906

Partnership—Firm Debt—Settlement by Partner—Parol Evidence—Writing Incomplete—Trial—Evidence in Rebuttal—Admissibility.

Where it appears that the parties to a written contract did not intend to reduce the whole contract to writing, and the part omitted is

consistent with the writing, such omitted part may be proved by parol.

Where both parties treated a writing as an incomplete memorandum of settlement, and introduced parol evidence in support of their respective claims as to the settlement, plaintiff was properly permitted to testify in rebuttal to the new matter shown by defendant's evidence.

An objection to evidence must be made when it is first offered.

A debtor of a firm bought notes executed by a partner. This partner and the debtor agreed that the firm's demand against the debtor, except $500, should be applied on said notes, and the partner delivered to the debtor a memorandum reciting that said notes were received in settlement of the firm's claim, except $500. *Held* that, as the memorandum was silent as to the time and manner of payment of the $500, it was proper to show the agreement in respect of those matters by parol.

A debtor of a firm bought notes executed by a partner. The partner and the debtor agreed that the firm's demand, against the debtor, except $500, should be applied on the notes. Subsequently the debtor authorized the partner to pay the firm the $500, and the partner agreed to do so if he acquired the money. *Held*, that this arrangement did not operate *prima facie* as a payment of the $500 to the firm.

Said arrangement would not be binding on the firm, without the co-partner's assent thereto.

Where a claim was payable immediately after settlement, it drew interest from such time without demand.

GENERAL ASSUMPSIT. Heard on the report of a referee and exceptions thereto at the December Term, 1905, Caledonia County, *Munson*, J., presiding. Exceptions overruled. Judgment on the report for the plaintiffs for $500, and interest from September 26, 1904, and costs. The defendant excepted. The opinion states the case.

Harland B. Howe for the defendant.

Dunnett & Slack pro se.

The subject-matter of the Johnson notes was introduced by defendant. This gave plaintiffs not only the right to meet this evidence, but to give their version of what occurred in respect of this subject-matter. *Baker & Sons* v. *Sherman*, 71 Vt. 450; *Perry* v. *Vermont Farm Machine Co.*, 70 Vt. 276; *Benedict* v. *Lawrence*, 67 Vt. 219.

TYLER, J. The referee reports that in the spring of 1904 the defendant owed the plaintiffs about $1,300 on account and note, and that he was pressed by them for payment; that in March or April, without the plaintiffs' knowledge, he bought of a Mrs. Stanley four notes which Dunnett had previously given to James Johnson and which amounted to more than the plaintiffs' demands against the defendant; that Dunnett was requested by the defendant to apply his indebtedness to the plaintiffs upon these notes, to which Dunnett replied that he would so apply his part of the demands, but that his partner must have the money for his part; that on September 26, 1904, Dunnett and the defendant made a complete settlement by which all of the plaintiffs' demands except $500 was applied on the Johnson notes, a note was given to the defendant by Dunnett for $217.69 and he was to give the defendant five other $100 notes when the defendant paid the plaintiffs the $500. Dunnett then delivered to the defendant a writing which reads:

"South Ryegate, Vt., Sept. 26th, 1904.

Rec'd from M. H. Gibson four promissory notes signed by me and I have given him my note for $217.69. These notes which I have received are to settle account and note of Dunnett & Slack against Gibson, except the sum of Five Hundred Dollars. When Gibson pays the firm of Dunnett & Slack Five Hundred Dollars, I am to deliver to said Gibson five of my

own promissory notes for One Hundred Dollars each of this date payable in 2, 3, 4, 5, and 6 months from this date."

The referee finds that the defendant was to pay the $500 immediately after the settlement, and that Slack soon after September 26 demanded payment of that sum of the defendant, who replied that he was trying to arrange with Dunnett to pay the $500 to the firm. On November 16 the defendant and Dunnett had some conversation in which Dunnett said in substance that if he had the money he might pay the firm, and the defendant then gave him a writing which was in effect authority to him to pay his firm the $500 in sums of $100 each at such times as the notes would be payable which were to be given him by Dunnett under the terms of the settlement. It was not convenient for Dunnett to make such payments and he has never paid the firm any part of the $500.

On two or three occasions after November 16 and before this suit was brought Slack demanded payment of the defendant of the $500, but he has never paid it. On two occasions after the suit was brought the defendant and his attorney demanded the notes of Dunnett, who replied that the defendant was not entitled to the notes until he had paid the firm.

At the trial Dunnett testified, without objection, that he made the settlement with the defendant on September 26, and that by its terms the defendant was to pay his firm $500 immediately, and he put the writing of that date into the case. In defence the defendant testified that he bought the Johnson notes for the plaintiffs at Dunnett's request; that he did not tell Dunnett that he would pay the plaintiffs the $500 immediately; that he was not to pay the plaintiffs any money, but that Dunnett agreed to take care of the $500 due to his firm. In rebuttal Dunnett testified, subject to the defendant's exception, that the defendant did not purchase the Johnson notes at his,

Dunnett's, request; that after the defendant bought them he, Dunnett, told him that he would apply part of the notes in payment of part of the account, that he, Dunnett, would give the defendant his notes for Slack's part and that defendant might use them as he chose; that Slack wanted and must have the money.

The defendant then moved to have all the parol testimony on this subject struck out on the ground that the contract was in writing and could not be varied by parol evidence; that the referee should construe the writing and determine when the $500 was to be paid. The motion was properly denied. Both parties had evidently treated the writing of September 26 as an incomplete memorandum of a settlement and had introduced evidence in support of their respective claims about the settlement. The defendant had introduced new matter in respect to his purchase of the Johnson notes and in respect to Dunnett's undertaking to take care of the $500 due the firm so that the defendant would not have to pay any money. It was clearly competent for Dunnett to testify upon these subjects in rebuttal. *Benedict* v. *Laurence*, 67 Vt. 219, 31 Atl. 291.

The motion was also out of time. Dunnett had in his opening testified fully and without objection about the terms of the settlement and the defendant's promise to pay the $500 immediately; the defendant had also testified fully on the subject, and Dunnett, as we hold, had been properly allowed to testify in rebuttal. Objection should have been made when testimony in respect to the settlement was first offered. *Wead* v. *St. J. & L. C. R. Co.*, 66 Vt. 420, 29 Atl. 631; *Lawrent* v. *Vaughn*, 30 Vt. 90, is directly in point.

The evidence was admissible. The memorandum was silent as to the time and manner of payment of the $500, and

it was clearly competent to show these facts by parol evidence. The case comes within the rule that, where it appears that the parties to a written contract did not intend to reduce the whole contract to writing, and the part omitted is consistent with the writing, such omitted part may be proved by parol evidence. *Winn* v. *Chamberlin,* 32 Vt. 318. It was evidently in this view that both Dunnett and the defendant testified in respect to the payment of the $500.

The defendant further contends that the writing given by the defendant to Dunnett operated *prima facie* as a payment of the $500 to the plaintiffs; that the report does not show that the writing had ever been returned to the defendant and that the burden was on the plaintiffs to overcome this presumption of payment. To this contention there are two answers; first, the writing only gave Dunnett permission to pay his firm. The language is, "You may pay Dunnett & Slack $100," etc. Dunnett evidently was to pay the firm if he had the money which the referee finds he did not have; second, Dunnett could not have bound his firm by such arrangement without his partner's assent, and such assent is not shown.

As the referee finds that the $500 was payable immediately after the settlement of September 26, 1904, no demand was necessary to fix the defendant's liability to pay interest. The referee correctly computed interest from the date of settlement. *Vt. & Ca. R. Co.* v. *Vt. Cen. R. Co.,* 34 Vt. 65.

Judgment affirmed.

UNITED STATES OF AMERICA FOR THE USE AND BENEFIT OF THE STANSTEAD GRANITE QUARRIES COMPANY, LIMITED, *v.* THE UNITED STATES FIDELITY AND GUARANTY COMPANY.

January Term, 1906.

Present: ROWELL, C. J., TYLER, MUNSON, WATSON, HASELTON, and POWERS, JJ.

Opinion filed February 21, 1906.

Contractors' Bonds—Action on—Federal Statutes—Security for Costs—Power of Court to Require—Jurisdiction of State Courts — Actions on Bonds—Debt—Covenant—Scope of V. S. 1184-1187.

The federal statute of August 13, 1894, entitled, "An Act for the protection of persons furnishing material and labor for the construction of public works," requiring contractors for governmental work to give bonds to the United States, conditioned both for the performance of the contract, and for the prompt payment of all persons supplying labor or materials in the prosecution of the work, and providing that such laborers or materialmen, in case of nonpayment, "shall have a right of action" on such bonds, "and shall be authorized to bring suit in the name of the United States for his or their use and benefit against said contractor and sureties," does not confer a remedy, but gives to such laborers and materialmen only *rights* of action, leaving them to enforce those rights under the laws and practice of the states where the suits are brought.

Said Act authorizes suits on such bonds in the name of the United States for the benefit of such unpaid laborers or materialmen, "provided, that in such case the court in which such action is brought is authorized to require proper surety for costs in case judgment is for the defendant." *Held*, that our county courts have inherent power to require such security to be given.

A suit on a bond given in conformity with the requirements of said Act, instituted by, and for the benefit of, a person having so furnished material, is properly brought in the name of the United

States, although it may have no interest in the subject-matter; for the legal interest in an independent contract under seal is in the covenantee, notwithstanding it is for another's benefit, or to be performed to another person.

The condition in a bond, given in conformity with the requirements of said Act, that the principals "shall promptly make payment to all persons supplying them labor or materials in the prosecution of the work contemplated by said contract," constitutes a covenant, for the breach of which the common law action of covenant may be maintained in this State.

Because of the provisions of said Act, said covenant is several, and although it does not *name* the "persons" referred to, each person who has furnished the contractors labor or material for which he has not been paid is entitled to the benefit of said covenant, and may severally maintain the common law action of covenant thereon.

This common law action of covenant, which each unpaid laborer or materialman is entitled to maintain on said condition of a bond given under said Act, is not controlled by the provisions of V. S. 1184-1187, relative to actions on penal bonds.

The purpose of V. S. 1185-1187, relative to actions on penal bonds, is to relieve defendants in actions of debt on bonds from having to resort to a court of equity to reduce the sum recovered from the amount of the penalty of the bond to the amount of damages actually proved.

V. S. 1184-1187, in reference to actions on bonds, does not furnish a remedy to the exclusion of an action at common law.

V. S. 1184-1187 is adapted to cases where there is only one obligee in the bond, or several obligees having joint rights, but not to cases where the rights of the obligees are entirely independent of each other.

COVENANT on a contractor's bond given in conformity to the Act of Congress of August 13, 1894. Heard on demurrer to the declaration at the September Term, 1904, Orleans County, *Rowell,* J., presiding. Demurrer overruled, *pro forma,* and declaration adjudged sufficient. The defendant excepted. In the bond, after naming the penal sum, follows the

clause, "for the payment of which, well and truly to be made to the United States, we bind ourselves, our heirs," etc.

J. W. Redmond for the defendant.

This bond is in the nature of an official bond. The United States is in no way interested, and therefore, the action can be maintained only in the federal courts. *U. S.* v. *Sheridan,* 119 Fed. 236; *Pickering* v. *Fisk,* 6 Vt. 102; *Judge of Probate* v. *Hibbard,* 44 Vt. 597; *Kerr* v. *Peter,* 60 Ill. App. 209; *King* v. *Cochran,* 72 Vt. 107; *Murtey* v. *Allen,* 71 Vt. 377; *Newell* v. *Fisher,* 24 Miss. 392; *Yearver* v. *Wallace,* 44 Pa. St. 294; High, Receivers, § 220.

The federal statute merely gives a remedy; it does not give a *cause* of action. Congress cannot dictate to the state courts in respect of remedies. *Bumpas* v. *Taggart,* 7 Am. Rep. 623; *Duffy* v. *Hobson,* 40 Cal. 240, 6 Am. Rep. 617; *Bennett* v. *Morris,* (Cal.) 37 Pac. Rep. 929; *Latham* v. *Smith,* 45 Ill. 29; *Craig* v. *Dimock,* 47 Ill. 309; *Bunker* v. *Green,* 48 Ill. 243; *U. S. Exp. Co.* v. *Haines,* 48 Ill. 248; *Bowen* v. *Byrne,* 45 Ill. 467; *Pargoud* v. *Richardson,* 30 La. Ann. 1286; *Davis* v. *Richardson,* 45 Miss. 499, 7 Am. Rep. 732; *More* v. *Clymer,* 12 Mo. App. 11; *Shultz* v. *Hemdon,* 32 Tex. 390; *Jacobs* v. *Spofford,* 34 Tex. 153; *Knox* v. *Rossi,* 48 L. R. A. 305.

Covenant does not lie on the words of a penal bond, when such words are inserted by way of condition or defeasance. 5 Cyc. 812; *U. S.* v. *Brown,* Fed. Cas. No. 14670; *Summers* v. *Watson,* Fed. Cas. No. 13605; *State* v. *Woodward,* 8 Mo. 353; *Powell* v. *Clark,* 3 N. J. L. 110; *Huddle* v. *Worthington,* 1 Ohio 423; *Abrams* v. *Kounts,* 4 Ohio 214; *Clark* v. *Murphy,* 1 Mo. 114.

F. E. Alfred and *W. W. Miles* for the plaintiff.

The state courts have jurisdiction of this action. *U. S.* v. *Rundle,* 100 Fed. 400; *Wisconsin Tr. Co.* v. *Robinson etc. Co.,* 68 Fed. 778; *Hooven et al.* v. *Featherstone,* 111 Fed. 81; *Carnegie etc. Co.* v. *Hulbert,* 70 Fed. 209; *Howard* v. *U. S.,* 184 U. S. 676; *Blackburn* v. *Portland etc. Co.,* 175 U. S. 571; *Chambers* v. *Harrington,* 111 U. S. 350, 28 L. Ed. 452.

The federal statute creates a right of action in behalf of the unpaid laborer or materialman. *U. S.* v. *Henderlong,* 102 Fed. 2; *Mullin* v. *U. S.,* 109 Fed. 817; *U. S.* v. *Hegaman et* al., (Pa.) 54 Atl. 344; *U. S.* v. *Fidelity & Deposit Co.,* 83 N. Y. 752; *Am. Surety Co.* v. *U. S.,* 77 Ill. App. 106; *Maryland* v. *Baldwin,* 112 U. S. 490; *Teall* v. *Felton,* 1 N. Y. 537; 1 Kent's Com. 395; *Claflin* v. *Houseman,* 93 U. S. 130; *Gilbert* v. *Priest,* 8 Nat. Bank, Reg. 159.

Covenant is the proper action. *Douglass* v. *Hennessy,* 15 R. I. 272; 2 Cyc. 1023-4; *Kennedy* v. *Kennedy,* 2 Bibb. 464; *Stickney* v. *Sargent,* 21 N. H. 61; *Astley* v. *Weldon,* 2 Bos. & Pul. 345; *Robinson* v. *Bland,* 2 Burr. 1085; *Bird* v. *Randall,* 3 Burr. 1351; *Harrison* v. *Wright,* 13 East. 347; *Dick* v. *Gaskill,* 2 Wheat. 184; 1 Chitty's Pl. 118; *Lowe* v. *Newsham Peers.,* 4 Burr. 2225; *Outtoun* v. *Dublin,* 72 Md. 536, 20 Atl. 134; *New Holland Turnpike Co.* v. *Lancaster Co.,* 71 Pa. St. 442; *Lee et al.* v. *State,* 22 Ark. 231; *McLaughlin* v. *Hutchins,* 3 Ark. 207; *Taylor* v. *Wilson,* 5 Iredell, N.C.) 214; *Ewing* v. *Gordon,* 49 N. H. 444; *Randall* v. *Lynch,* 12 East. 179; *Sedon* v. *Senate,* 13 East 63; *Martin* v. *Taylor,* 1 Wash. C. C. 1; *Graham* v. *Bickham,* 4 Dall. 149; *Perkins* v. *Lyman,* 11 Mass. 76; 3 Enc. Pl. & Pr. 1070.

TYLER, J. The declaration is in covenant, in three counts, upon a bond given by Conners Brothers as principals and the defendant as surety, to the United States, relating to a

certain contract made by Conners Bros. with the Secretary of the Treasury by which they were to construct a federal building at Newport in this State. The bond is recited and the condition thereof is as follows:

"Whereas the said Conners Bros. have entered into a certain contract, hereto attached, with L. M. Shaw, Secretary of the Treasury acting for and in behalf of the United States, bearing date September 15, 1902: NOW if the said Conners Bros. shall well and truly fulfill all the covenants and conditions of said contract, and shall perform all the undertakings therein stipulated by them to be performed, and shall well and truly comply with and fulfill the conditions thereof, and perform all the work and furnish all the labor and materials required thereby, * * * and shall promptly make payment to all persons supplying them labor or materials in the prosecution of the work contemplated by said contract, then this obligation to be void, otherwise to remain in full force and virtue."

It is alleged in the first count that, by the terms of the contract, Conners Bros. covenanted and agreed with the United States to furnish all the labor and materials and perform all the work required in the construction of the building; and that the defendant, in and by said bond, covenanted that Conners Bros. should promptly make payment to all persons who furnished them with labor or material in the prosecution of the work contemplated by the contract; that the Granite Quarries Co., at Conners Bros.' request, furnished a large amount of granite for said building. The breach alleged is that Conners Bros. have not paid the Granite Quarries Co. for material furnished by it for said building, at Conners Bros.' request, and that they have not paid the penal sum named in the bond.

It is alleged that the suit is brought and prosecuted under and by virtue of the provisions of an Act of Congress, entitled: "An Act for the protection of persons furnishing material and labor for the construction of public works," approved August 13, 1894, which reads: "Any person or persons entering into a formal contract with the United States for the construction of any public building, or the prosecution and completion of any public work, * * * , shall be required before commencing such work to execute the usual penal bond with good and sufficient sureties with the additional obligation that such contractor or contractors shall promptly make payments to all persons supplying him or them labor and materials in the prosecution of the work provided for in such contract; and any person or persons making application therefor and furnishing affidavit to the department under which the work is being or has been prosecuted, that labor or material for the prosecution of such work has been supplied by him or them and that payment for the same has not been made, shall be furnished with a certified copy of said contract and bond upon which said person or persons supplying such labor and materials shall have a right of action, and shall be authorized to bring suit in the name of the United States for his or their use and benefit against said contractor and sureties and to prosecute the same to final judgment and execution; provided, that such action and its prosecution shall involve the United States in no expense; provided that in such case the court in which said action is brought is authorized to require proper security for costs in case judgment is for the defendant."

The case comes here upon a demurrer to the declaration. The defendant contends that this statute creates no *cause* of action; that it only affords a *remedy* for the classes of persons named in the Act; that the cause of action is that given by the

common law for labor or materials furnished the contractors at their request; that the United States has no interest in the subject-matter of the controversy and therefore cannot be a party plaintiff; that Congress cannot dictate remedies to state courts; that remedies are governed by the *lex fori;* that Congress has no more authority to legislate concerning remedies in state courts than it has in relation to the rules of evidence in those courts; that this power is not incidental to the power of the United States to make contracts for the construction of public buildings; that the Act constitutes general legislation for the benefit of certain classes of persons and that it must be presumed that Congress did not intend that these persons should seek to enforce their remedies in state courts.

The defendant also contends that the words, "Shall promptly make payment," etc., do not constitute a covenant; that they are inserted merely for the purpose of showing, in connection with the other conditions, the terms on which the obligors could discharge themselves from the obligation of the bond.

Both state and federal courts, in various jurisdictions, have so many times construed this and similar statutes, that it cannot now be doubted that it was the intention of Congress to leave questions like the one at bar for the decision of state courts. *United States, to the use of Nichola Bros. Co.,* v. *Hegeman,* 54 Atl. R. 344, (Penn.); *American Surety Co.* v. *United States, for the use and benefit of Alexander Watt,* 77 Ill. App. 106; *Sayer & Fisher Co.* v. *Greifen,* 60 Atl., 513, (N. J.); *United States* v. *Churchyard,* 132 Fed. 88, C. C. Dist. R. I.

A sentence from the opinion of Mr. Justice Bradley in *Claflin* v. *Houseman,* 93 U. S. 130, 23 Law. ed. 833, is in point: Rights, he says, whether legal or equitable, acquired

under the laws of the United States, may be prosecuted in the United States Courts, or in the state courts competent to decide rights of the like character and class, subject, however, to this qualification, that where a right arises under a law of the United States, Congress may, if it sees fit, give to the federal courts exclusive jurisdiction. The fact that a state court derives its existence and functions from the state laws is no reason why it should not afford relief; because it is also subject to the laws of the United States, and is just as much bound to recognize these as operative within the state as it is to recognize the state laws. The two together form one system of jurisprudence, which constitutes the law of the land for the state; and the courts of the two juristictions are not foreign to each other, nor to be treated by each other as such, but as courts of the same country, having jurisdiction partly different and partly concurrent. See also notes to *Teal* v. *Felton*, 49 Am. Dec. 352.

It it well settled that while Congress might, in its discretion, have given exclusive jurisdiction of this class of actions to federal courts, and required that they should be, in respect to citizenship and amount in controversy, within the requirements of the judiciary act, it did not restrict the jurisdiction to those courts.

The plaintiff relies upon what it claims to be an express covenant in the bond, that Conners Bros., "Shall promptly make payment," etc. It was not necessary that persons should have been *named* in the bond; it was sufficient that *any* person subsequently furnished the contractors labor or materials to entitle him to the benefit of the covenant. That the Granite Quarries Co. became one of such persons is alleged in the declaration and admitted by the demurrer.

The United States was a party to the contract and the obligee in the bond, and both instruments were evidently made in compliance with the Act.

The conclusion is unavoidable that the covenant is several. The language of the Act is: * * * "And any person or persons making application therefor and furnishing affidavit to the department under which the work is being or has been prosecuted, that labor or material for the prosecution of such work has been supplied by him or them and payment for the same has not been made, * * * shall have a right of action and shall be authorized to bring suit in the name of the United States for his or their use or benefit." The fact that a material man has brought a suit upon the bond in the name of the United States could not deprive a laborer of his right of action. Each person who supplied labor or material has a right of action independent of the rights of action of all other persons. While the Act makes the United States the party in legal interest, it is made such party for the benefit of the persons who have supplied labor or materials.

We need not inquire whether the United States has any interest in fact in the subject-matter of the contract, for the law is well settled that upon instruments under seal suit must be brought by the covenantee; and although the instrument may be expressed to be for the benefit of a third person, there is not sufficient privity in law between such third person and the covenantor to enable him to maintain an action. *Fairchild* v. *N. E. Mut. Life Asso.*, 51 Vt., 613, and cases cited in the opinion; therefore, if this action is maintainable, it is properly brought in the name of the United States as the covenantee in the bond. It is an elementary rule, that the legal interest in an independent contract under seal resides with him to whom it has been given, notwithstanding it is for another's benefit,

or to be performed to another person; and therefore, when an obligation is made for the use of B, it was held that B could not sue or release it. Hammond on Parties, 14.

The defendant's contention is not maintainable, that the words in the bond: "And shall promptly make payment to all persons," etc., do not constitute a covenant; that they are inserted in the bond merely for the purpose of showing, in connection with the other conditions, the terms on which the obligors could discharge themselves from the obligation of the bond. It was said in *Douglas* v. *Hennessy,* 10 Atl. 583, (R. I.) that although actions of covenant upon an ordinary bond with defeasance are not common, yet they are not without authority to support them; that the difficulty in such cases lies in finding a promise in the instrument. In that case the covenant sued on was the promise to pay, contained in the words, "To which payment well and truly to be made I bind myself," etc., which were attached to the condition of defeasance; held, that the words sufficiently imported a promise to support the action. See cases cited in that opinion. But it is not necessary to go out of our own State for authority on this subject. In *Marvin* v. *Bell,* 41 Vt. 607, it was decided that a condition in a bond not to do a certain act specified therein, was in legal effect and operation a stipulation not to do such act, and the doing of it is a breach of the condition. The condition in that case was not to engage in a certain kind of business in a certain town.

In the present case the words quoted are more than the recital of an agreement; they constitute in legal effect a stipulation to perform certain acts, and it is evident that the bond was required and given in view of the Act of Congress. It must be considered that the parties intended that the bond be so construed as to carry out and effectuate the intent of

the Act in this respect, and that they understood that the covenant was several, in the sense that it was a promise to the United States to pay severally all persons in the two classes named in the Act.

The defendant further contends that state courts have not jurisdiction of a suit brought under the Act of Congress because it claims that the Act relates wholly to the *remedy* which must be controlled by the laws of the forum. It seems clear, however, that the Act gives to the two classes of persons mentioned only *rights* of action, leaving those persons to enforce their rights under the laws and practice of the states where the suits are brought.

A more serious question arises in attempting to enforce the rights thus conferred. It is alleged in substance in the declaration that Conners Bros. and the defendant jointly and severally covenanted, promised and agreed with the United States * * * that Conners Bros. should promptly make payment to all persons supplying Conners Bros. labor or material in the prosecution of the work contemplated by the contract.

We think that sections 1181 to 1187, V. S., do not furnish the sole remedy in actions upon bonds. Sec. 1185 reads: "In actions on bond, or for a penal sum for the non-performance of covenants or agreements contained in a condition, indenture, deed or writing, the plaintiff may assign as many breaches as he chooses; damages shall be assessed for such breaches as he proves, and judgment rendered for the whole penalty, and execution issue for so much only as is found in damages, with costs." The provisions of this section came into our laws by an Act passed in 1797, which is a reenactment of a part of 8 and 9 W. 3. c. 11. But the English statute further provides that the plaintiff shall have judgment for such

breaches as he then proves, and that in each case the judgment shall remain as a further security to answer to the plaintiff such damages as he may sustain by any further breach of covenant contained in the same indenture, deed or writing.

The purpose of the English statute was to relieve defendants from the payment of further sums than were in conscience due in actions of debt to recover the penalty. See *Gainford* v. *Griffith,* 1 Saund. 58, where it is said that the statute is confined to actions of debt.

The evident purpose of our statute is to relieve defendants in actions of debt on bonds from having to resort to a court of equity to reduce the sum recovered from the amount of the penalty of the bond to the amount of damages actually proved. The statute was so construed in *Williams* v. *Wilson,* 1 Vt. 266. In *Marvin* v. *Bell,* 41 Vt. 607, in an action of debt on a bond, it was held that the judgment should be for the full penalty of the bond and that execution should issue for so much only as had been found in damages, leaving the remainder, if any, as security for any injury that might result from further breaches, to be made available by way of *scire facias* on such judgment.

The plaintiff contends that its remedy is at common law and not under our statute. It does not contend that covenant and debt are not concurrent remedies upon bonds of this kind, but it insists that covenant is a proper remedy, and, for certain reasons the appropriate remedy.

The general rule is given in 1 Chit. Pl. 101, that covenant is a remedy calculated for the recovery of damages for the breach of a covenant or contract under seal, and that it appears in general to be a concurrent remedy with debt, for the recovery of any money demand where there is an express or implied contract contained in the deed; that covenant is in

many instances preferable to debt because in the latter action the plaintiff is limited to a recovery of the amount stated, while in covenant he is entitled to whatever damages he can prove. The rule is stated in *Stickney* v. *Sargent*, 21 N. H. 61, that covenant is a remedy recognized by law for the recovery of damages for the breach of a covenant or contract under seal.

Our statute is adapted to cases where there is only one obligee in the bond, who, upon a breach of the covenant therein, may sue and recover a judgment for the penalty, assigning as many breaches as he chooses. The judgment remains as security to him or his personal representatives for any other breaches for which he may have *scire facias* upon his judgment. The statute would also apply where there were two or more obligees having joint rights, but not to cases where rights are entirely independent of each other though conferred by the same legislative Act.

On the other hand, the defendant is liable in debt, under this statute, to only one judgment, which is for the penalty unless he applies for and is allowed a reduction of the damages. A judgment for the penalty would be a bar to other persons seeking to enforce other but independent rights, whether such judgment were for or against the plaintiff, for the term "his representatives" used in section 1187, can, by no rule of construction, be held to include other claimants for labor or material furnished.

As the rights of action acquired by the two classes of persons named in the Act are separate and distinct from each other, it follows that if there were no rights but the plaintiff's to be enforced, it might resort to our statute as a remedy; but as there may be other rights, they should not be imperiled by any judgment in this case. The statute should not be held

to afford a remedy to the exclusion of an action at common law.

A judgment for the plaintiff, upon this bond, in the common law action of covenant, would not be a bar to other actions that may be brought by the United States upon the same bond for the use and benefit of other material men or laborers who have not been paid in accordance with the covenant.

That this holding may induce a multitude of suits is not an argument against the plaintiff's right of recovery in its action of covenant, which, as has been shown, is an appropriate remedy.

The county court has inherent power to require that security be given for costs.

Judgment affirmed and cause remanded.

Rowell, C. J., concurs in the result.

CHARLES CORBIN *v.* GRAND TRUNK RAILWAY CO.

January Term, 1905.

Present: ROWELL, C. J., TYLER, MUNSON, WATSON, HASELTON, and POWERS, JJ.

Opinion filed February 24, 1906.

Negligence—Railroad—Construction of Crossing — Passing Between Cars—Invitation—Signals—Proximate Cause —Accident.

In an action for injuries received in attempting to pass between the cars of defendant's train which, while being loaded with gravel,

obstructed a highway crossing, it appeared that plaintiff was injured by a movement of the train after he had mounted between the cars, which he did in consequence of a motion by one of defendant's employees, given in the line of duty, which plaintiff thought, and was justified in thinking, was an invitation for him to cross the train, but which really was a signal to the engineer to move the train. The referee was unable to find that defendant's employees were negligent in any respect as regards plaintiff's movements. *Held*, that the occurrence was a mere accident, for which defendant was not responsible.

Even if the obstrucing of the crossing was unlawful, it does not follow that this was a negligent act in respect of plaintiff; for, if it was not an efficient cause of the injury it could give rise to no liability.

Negligence is a shortage of legal duty that causes injury.

The mistake of plaintiff in misconstruing the signal, together with his consequent attempt to cross the train, constituted the sole, proximate cause of the injury; and his action was an exercise of his own judgment and will, and was not, in the legal sense, a consequence of the obstruction of the crossing.

Isham v. *Davis' Est.*, 70 Vt. 588, distinguished.

CASE for negligence. Heard on the report of a referee and exceptions thereto at the October Term, 1904, Essex County, *Start*, J., presiding. Judgment for the defendant to recover its costs. The plaintiff excepted. The opinion states the case.

Cook & Williams, and *J. W. Redmond* for the plaintiff.

The obstruction of the crossing was wrongful, and was a link in the chain of causes which produced the injury. *Holmes* v. *Fuller*, 68 Vt. 207; *Stickney* v. *Maidstone*, 30 Vt. 738; *Mobus* v. *Waitsfield*, 75 Vt. 122; *Lee* v. *Riley*, 18 C. B. (N. S.) 722, 34 L. J. C. P. 212; *Clark* v. *Chambers*, 3 Q. B. D. 327; *Milwaukee etc. R. Co.* v. *Kellogg*, 94 U. S. 469; *Burrows* v. *March, etc. Co.*, L. R. 7 Ex. 96, 18 Eng. Rul. Cas. 708.

If plaintiff adopted the course of conduct which he was justified in thinking was indicated by McMahon, then Mc-

Mahon invited him to cross, and defendant is liable, 3 Elliott, Railroads, § 1171; *Eddy et al.* v. *Powell,* 49 Fed. 814; 17 Eng. Rul. Cas. 252.

C. A. Hight, L. L. Hight, and *Harry Blodgett* for the defendant.

It cannot be said that the obstruction of the crossing was a wrong. Wood, Railroads, 1620; *Magoon* v. *R. R.,* 67 Vt. 177.

The obstruction of the crossing was not the proximate cause of plaintiff's injury. *Gilson* v. *Delaware, etc. Co.,* 65 Vt. 213; *Jackson* v. *Railway Co.,* 13 Lea 491, 49 Am. Rep. 663; *Pittsburg etc. Co.* v. *Stanley,* 41 Ohio St. 118, 52 Am. Rep. 74; *Wood* v. *Penn. R. Co.,* 55 Am. S. Rep. 728; *Evansville etc. R. Co.* v. *Welch,* 81 Am. S. Rep. 102.

MUNSON, J. The defendant was loading its gravel train by means of a steam shovel, while the train was obstructing a highway crossing. The plaintiff attempted to cross the train between two cars, just as the filling of one car was completed and the train was about to be moved to bring forward another. As the plaintiff was getting upon the end of a car, the train started, causing the injury complained of. The plaintiff claims that he was induced to make this attempt by the conduct of McMahon, the steam shovel boss, who was then directing the movements of the train.

It appears that McMahon made a motion with his arm, which the plaintiff supposed was an invitation for him to climb over the cars. The referee finds that the plaintiff was justified in thinking the motion was an invitation to cross, and that he was not negligent in making the attempt. But the referee finds that the motion so understood by the plaintiff was

in fact a signal to the engineer to move the train, or some other signal; and says he is unable to find that any invitation to cross was given the plaintiff, or that defendant's employees were negligent in any respect as regards the plaintiff's movements.

If we confine our attention to the circumstances attending the plaintiff's attempt to cross and the starting of the train, it is clear that the plaintiff has no case. The findings amount to this. The defendant's employee, without negligence, gave some signal in the line of his duty. The plaintiff, without negligence, took this to be an invitation for him to cross. The occurrence resulting from this combination was a mere accident.

But the plaintiff argues that the obstruction of the crossing was an unlawful and negligent act; that the findings relieve him from fault in being upon the car; and that the starting of the train which caused his injury was but one of a series of movements included in the continued occupation of the crossing. The plaintiff would thus make the obstruction of the crossing the proximate cause of his injury.

But, assuming the correctness of the plaintiff's position as regards the unlawfulness of the obstruction, it does not follow that the maintenance of the obstruction was a negligent act as regards the plaintiff. The disregard of a statutory requirement is not necessarily negligence in the juridical sense. Negligence is a shortage of legal duty that causes injury. The fact that an act is in violation of law does not dispense with an inquiry as to the relation which that act sustains to the injury complained of. If it is not an efficient cause of the injury there is no liability.

Generally, in cases of this class, the test of actionable negligence is whether the injury which followed the act or

omission in question was a natural and probable consequence of it in the sense that a prudent man ought to have foreseen it. *Morrisette* v. *Canadian Pacific R. R. Co.*, 74 Vt. 232 (242), 52 Atl. 520. It is by an application of this test that we determine whether the first of two causes is the proximate cause, or only a remote cause, of the resulting injury.

The plaintiff assumes that his case stands like that of *Isham* v. *Dow's Est.*, 70 Vt. 588, 41 Atl. 585, and cites particularly that part of the opinion which says that in such circumstances the law treats the act of the defendant as the proximate cause of the injury, whether the injury was or could have been foreseen or not, or was or was not the probable consequence of the act. But in that case the injury was due to an unlawful act operating through a succession of resulting events whose continuity was not broken by any other agency. The bearing of the decision is also manifest from the further statement: "On the question of what is negligence, it is material to consider what a prudent man might reasonably have anticipated; but when negligence is once established, that consideration is entirely immaterial on the question of how far that negligence imposes liability."

The finding which relieves the plaintiff from the imputation of negligence does not affect the relation which his act sustained to the injury received. That act, whether prudent or negligent, was the immediate cause of his injury. It was an independent cause, for it resulted from an exercise of his own judgment and will. It was not a consequence of the obstruction of the crossing in the legal sense. It is true that if there had been no train there the plaintiff would not have had an opportunity to make the mistake that he did. But, the making of such a mistake and an attempt to cross under such circumstances because of it, were not con-

sequences that could reasonably be expected to result from the obstruction. So the act of the plaintiff, although free from the taint of negligence, must be considered the sole proximate cause of his injury.

Judgment affirmed.

STATE v. HENRY WEBBER.

October Term, 1905.

Present: ROWELL, C. J., TYLER, WATSON, HASELTON, and POWERS, JJ.

Opinion filed March 2, 1906.

Perjury—V. S. 5417, Form 49—Sufficiency.

An indictment for perjury in the form prescribed by V. S. 5417, form 49, which avers that the respondent "committed the crime of perjury," sufficiently alleges that he was sworn by a person legally qualified to administer the oath; for the word "perjury" implies an oath lawfully administered.

The Legislature may prescribe the form of indictments, providing it does not thereby contravene the constitutional provisions.

The highest degree of certainty is not required in indictments, but the charge must be set forth with such accuracy as will enable the respondent to intelligently prepare to meet it, and, if convicted, to successfully plead his conviction in a subsequent prosecution therefor.

An indictment in the form prescribed by V. S. 5417, form 49, charging perjury before a grand jury, which does not allege the subject-matter of the investigation then being pursued by the grand jury, does not meet the requirement of Article 10 of the Constitution, guaranteeing to an accused the right to demand the cause and nature of the accusation against him.

INDICTMENT for perjury. Heard on demurrer to the indictment at the June Term, 1905, Caledonia County, *Munson*, J., presiding. Demurrer overruled, *pro forma*, and indictment adjudged sufficient. The respondent excepted.

Taylor & Dutton for the respondent.

The indictment should have alleged by whom the oath was administered, and show that such person was legally qualified to administer an oath. 2 Bish. New Crim. Proc., § 902; *Merrell* v. *People*, 32 Ill. 499; *Kerr* v. *People*, 42 Ill. 307; *State* v. *Schill*, 27 Iowa 263; *U. S.* v. *Wilcox*, 4 Blatchf. 391.

The indictment is fatally defective in not alleging the subject-matter being investigated by the grand jury. *State* v. *McCone*, 59 Vt. 117; *State* v. *Estabrooks*, 70 Vt. 412; *State* v. *Rowell*, 70 Vt. 405; *State* v. *Dow*, 74 Vt. 119; *State* v. *Ayer*, 40 Kan. 43; *State* v. *Hanson*, 39 Me. 337; *Reg.* v. *Pearson*, 8 Car. & P. 119; *Reg.* v. *Bishop*, 1 Car. & M. 302; *State* v. *Shupe*, 16 Iowa 36; *State* v. *Oppenheimer*, 41 Tex. 82.

Frank D. Thompson, State's Attorney, and *David E. Porter* for the State.

It is not necessary to allege that the grand jury were investigating a certain matter. *U. S.* v. *Kimball*, 117 Fed. 156; *U. S.* v. *Brown*, 1 Sawy. 531, Fed. Cas. No. 14671; *U. S.* v. *Reed*, 2 Blatch. 435, Fed. Cas. No. 16134.

POWERS, J. This is an indictment in two counts charging the respondent with perjury before the grand jury of Caledonia County at its June session, 1905. The indictment and each count thereof is demurred to; and we are called upon

to determine the sufficiency of the statutory form, (V. S. 5417, F. 49), in conformity to which this indictment is drawn.

The first ground of demurrer urged by the respondent is that neither count contains a sufficient allegation that the respondent was sworn before the grand jury by a person legally qualified to administer the oath. The first count is entirely silent on this subject. The second alleges that the respondent was "sworn by and before said grand jury to tell the whole truth," etc. Each count alleges that the respondent "committed the crime of perjury," and under the decision in *State* v. *Camley,* 67 Vt. 322, 31 Atl. 840, this is all that is required in respect of the respondent's being sworn. A direct averment that he was sworn is not necessary, since the term "perjury," *ex vi termini,* implies an oath lawfully administered. *State* v. *Corson,* 59 Me. 137; *State* v. *Peters,* 107 N. C. 876; *State* v. *Gates,* Ib. at p. 834. And this is so whether the crime charged is common law perjury or statutory false swearing, for in this respect they are essentially the same.

It is further urged that the indictment is fatally defective because neither count specifies the subject-matter of the investigation then being pursued by the grand jury. On this point the Camley case is not authority, for the question was not there involved; and as was pointed out in *State* v. *Rowell,* 70 Vt. 405, 41 Atl. 430 that decision went no farther than to cover certain elements of the crime itself. The respondent insists that the indictment here and the form prescribed by the statute are insufficient to meet the requirements of the Constitution, and that therefore the Legislature had no authority to establish its sufficiency. The Legislature may simplify and mould the form of indictments at pleasure, provided in so doing it does not contravene the constitutional provisions and leaves enough to meet the constitutional requirements. *State*

v. *Comstock,* 27 Vt. 553. But this power of the Legislature is thus limited, and if, as claimed by the respondent, this indictment does not sufficiently apprise him of the cause and nature of the accusation brought against him, as required by Art. 10 of the Constitution of the State, it is fatally defective, notwithstanding the Legislature has declared that such an indictment shall be sufficient. Is it necessary, then, in order to meet this requirement and to sufficiently inform this respondent of the cause and nature of the charge, to specify the matter then under consideration by the grand jury? We think it is. The highest degree of certainty is not required, but the charge must be set forth with such accuracy of circumstance as will apprise him with reasonable certainty of the nature of the same, that he may intelligently prepare to meet it, and if convicted, successfully plead his conviction in a subsequent prosecution therefor. This must not be left to conjecture or inference; it must appear by positive averment. In no other way can a respondent get the full benefit of this salutary provision of the Constitution. It is strongly intimated, though not decided, in *Com.* v. *Pickering,* 8 Gratt. (Va.) 628, that in charging perjury committed before a grand jury, the particular inquiry then before that jury must be set out in the indictment; and it is expressly held in *Com.* v. *Taylor,* 96 Ky. 394, that such allegation is necessary to fully apprise the accused of the nature of the charge against him.

The pro forma judgment is reversed, the demurrer sustained, the indictment adjudged insufficient and quashed, and the respondent let go without day.

STATE *v.* ALWIN P. HAZELTON.

October Term, 1903.

Present: ROWELL, TYLER, MUNSON, START, WATSON, and HASELTON, JJ.

Opinion filed March 8, 1906.

Intoxicating Liquors — Sales — Indictment — Sufficiency — Statutes Partly Unconstitutional—No. 90, Acts 1902.

That clause of § 21, No. 90, Acts 1902, which permits sales of cider "by the barrel by farmers who raise sufficient apples to make the cider which they sell," does not give to *farmers* who raise apples a privilege denied to others who raise apples. Anyone is a "farmer," within the meaning of this clause, who has land upon which there are trees producing apples.

That part of §21, No. 90, Acts 1902, which exempts from the provisions of the Act "sales by the barrel by the manufacturers thereof of cider manufactured in this State, * * if it is not drunk on the premises," and "sales by the makers thereof of native wines manufactured in this State, and not to be drunk on the premises of the maker," discriminates against the products of other states in violation of the Fourteenth Amendment of the Constitution of the United States.

This unlawful discrimination is not such an essential element of the legislative scheme as to vitiate the whole Act; and the objectionable distinction is eliminated by holding that *all* sales of wines and of cider by the barrel, when not to be drunk upon the premises, are unrestricted by the Act.

An indictment charging the sale of "intoxicating liquor" without a license, in violation of No. 90, Acts 1902, sufficiently describes the kind of liquor.

INDICTMENT for selling and furnishing intoxicating liquor, in violation of No. 90, Acts 1902. Heard on demurrer to the indictment at the June Term, 1903, Orange County, *Munson,* J., presiding. Demurrer overruled, *pro forma,* and indictment adjudged sufficient. The respondent excepted.

John B. Peckett, and *Darling & Darling* for the respondent.

A discussion of the limitations which the Legislature must observe in the enactment of police regulations may be found in the following cases. *People, ex rel. Troyler* v. *Warden, &c.,* 157 N. Y. 116, 43 L. R. A. 264; *Re Morgan,* (Colo.) 47 L. R. A. 52; *Ritchie* v. *People,* 154 Ill. 98, 46 Am. St. Rep. 315, 29 L. R. A. 79; *C. B. & Q. R. Co.* v. *State,* 47 Neb. 549, 41 L. R. A. 481; *State* v. *Chic. &c. R. Co.,* 68 Minn. 381, 64 Am. St. Rep. 482; Black Intox. Liq. 25; *New Orleans Gas Lt. Co.* v. *Louis Lt. &c. Mfg. Co.,* 115 U. S. 650, 29 L. ed 516; 22 Am. & Eng. Enc. (2nd ed.) 936; *State* v. *Speyer,* 67 Vt. 502; *State* v. *Goodwill,* (W. Va.) 6 L. R. A. 621.

The discriminations in § 21, No. 90, Acts 1902, are clearly unconstitutional. *State* v. *Cadigan,* 73 Vt. 245; *State* v. *Shedroi,* 75 Vt. 277; Cooley Con. Lims. (1st ed.) 391; *Connelly* v. *Union Sewer Pipe Co.,* 184 U. S. 540; *Cotting* v. *Stock Yards Co.,* 183 U. S. 79; *Yick Wo* v. *Hopkins,* 118 U. S. 359, 30 L. ed. 220; *Frorer* v. *People,* 141 Ill. 171, 16 L. R. A. 492; *Dixon* v. *Poe,* (Ind.) 65 N. E. 518, 60 L. R. A. 308; *Juniata Limestone Co.* v. *Fagley,* 187 Pa. St. 193, 42 L. R. A. 442; *Denver* v. *Bach,* (Colo.) 46 L. R. A. 848; *Van Harlington* v. *Doyle,* 134 Cal. 53; *State* v. *Pennoyer,* 65 N. H. 113, 5 L. R. A. 709; *Re Day,* 181 Ill. 73, 50 L. R. A. 519; *Enterprise Brewing Co.* v. *Grime,* 173 Mass. 255; *McGovern* v. *Hays & Smith,* 75 Vt. 108; 14 Am. & Eng. Enc. (2nd ed.) 560; *Welton* v. *Missouri,* 91 U. S. 275; *Walling* v. *Michigan,* 116 U. S. 446; *Powell* v. *Pennsylvania,* 127 U. S. 678; *Kohn* v. *Melcher,* 29 Fed. 433; *Weil* v. *Calhoun,* 25 Fed. 865; *Ex.* v. *Kinnebrew,* 35 Fed. 52; *McCreary* v. *State,* 73 Ala. 480;

State v. *Deschamp*, 53 Ark. 490; *State* v. *Nash*, 97 N. C. 514; *State* v. *Stucker*, 58 Iowa 496; *McGuire* v. *State*, 42 Ohio St. 530; 17 Am. & Eng. Enc. (2nd ed.) 216; Black Intox. Liq. § 44; *Chy Lung* v. *Freeman*, 92 U. S. 276.

These unconstitutional provisions are so essential to the legislative scheme, and so interwoven with the rest of the enactment, as to render the whole void. *Redell* v. *Moores*, 55 L. R. A. 740; *Sibley* v. *Smith*, 2 Mich. 436; *U. S.* v. *Union P. R. Co.*, 91 U. S. 72; *Keyport &c. Co.* v. *Farmers' Transp. Co.*, 18 N. J. Eq. 13; *Delaplane* v. *Crenshaw*, 15 Gratt. 457; *Union Sewer Pipe Co.* v. *Connelly*, 99 Fed. 354; *Brown* v. *Jacobs Pharmacy Co.*, 115 Ga. 429, 57 L. R. A. 547; *State* v. *Montgomery*, 94 Me. 192; *Weaver* v. *Davidson Co.*, 104 Tenn. 315; *Johnson* v. *State*, 59 N. J. L. 535, 38 L. R. A. 373; *Crawford Co.* v. *Hathaway*, (Neb.) 84 N. W. 271; *Spraigue* v. *Thompson*, 118 U. S. 90, 30 L. ed. 115; *Warren* v. *Charlestown*, 2 Gray 84; *Matthews* v. *People*, 202 Ill. 389.

David S. Conant, State's Attorney, and *M. M. Wilson* for the State.

The Fourteenth Amendment was not designed to interfere with the police power of the State. *Lincoln* v. *Smith*, 27 Vt. 328; *State* v. *Hodgsden*, 66 Vt. 134; *Barbier* v. *Connonly*, 113 U. S. 27; *Powell* v. *Penn.* 127 U. S. 683; *Bartemeyer* v. *Iowa*, 18 Wall. 129; *Kohn* v. *Melcher*, 29 Red. 433; *Beer Co.* v. *Mass.*, 97 U. S. 25; Brannans 14th Amend. Ch. 12; *Mugler* v. *Kan.*, 123 U. S. 623; *Kidd* v. *Pearson*, 128 U. S. 1; *McGaher* v. *Virginia*, 135 U. S. 313; *In re Hoover*, 30 Fed. 55; *Cantina* v. *Tillman*, 54 Fed. 969.

If the discrimination objected to is unconstitutional, it may be rejected, and the remainder of the Act be valid. Cooley Constitutional Lim. pp. 211, 212, 213, 216; *State* v. *Kibling*,

63 Vt. 642; *Ex Parte Kiennebrew,* 35 Fed. 52; *Tienan* v. *Rinker,* 102 U. S. 123; *In re Rahrer,* 140 U. S. 563; *Fishier* v. *McGirr,* 1 Gray 1; *Donnerberger* v. *Prendergast,* 128 Ill. 239; *Lawton* v. *Steele,* 7 L. R. A. 134.

MUNSON, J. The respondent contends that No. 90 of the Acts of 1902 is unconstitutional in two particulars, and that these defects invalidate the entire act.

The exemption in section 21 which permits sales "by the barrel by farmers who raise sufficient apples to make the cider which they sell," is claimed to be in violation of the provision of the Fourteenth Amendment to the Federal Constitution which guarantees the equal protection of the laws, and in violation of the seventh article of chapter one of our State Constitution, which declares in substance that government ought not to be for the particular advantage of any class. It is said that the exemption makes the lawfulness of the act depend upon the mere fact of occupation,—giving to farmers who raise apples a privilege denied to others who raise apples. But as we construe the provision no such distinction is made. Any one is a farmer within the meaning of this clause who has land upon which there are trees producing apples. Nothing further is claimed regarding this provision.

It is also asserted that the following provisos of the same section are invalid: "But the provisions of this act shall not apply to sales by the barrel by the manufacturers thereof of cider manufactured in this State," nor to "sales by the makers thereof of native wines manuactured in this State." It is claimed that these provisions discriminate against the products of other states, and are therefore within the inhibitions of the Federal Constitution.

The effect of these provisos is to permit unlicensed sales, by the makers, of cider and native wines manufactured in this State, while the same products manufactured in other states cannot be sold here by the makers thereof as such, nor sold here at all without the payment of license fees. A discrimination of this character cannot be sustained unless based upon some distinction which is reasonable and just when considered with reference to the nature and purpose of the act. We see no ground upon which the discrimination complained of can be justified. The only apparent purpose or effect of the exception is to favor the home product. Further discussion of the subject seems unnecessary in view of our recent decisions. *State* v. *Hoyt*, 71 Vt. 59, 42 Atl. 973; *State* v. *Cadigan*, 73 Vt. 245, 50 Atl. 1079.

It remains to consider how much and what part of the act must be held invalid because of this unconstitutional feature. It is suggested that the whole act should be held void, on the ground that it would never have become a law if it had not contained these popular but unconstitutional provisions. If we could come to this conclusion at all, it is certain that we could not do so without considering matters which seem to us to be outside the field of legitimate judicial inquiry; and this objection must be overruled.

But the respondent also contends that the clauses creating the unlawful discrimination vitiate the whole act because not separable from the rest of the act. It is clear that the entire act must be held invalid, unless the objectionable distinction can be eliminated, so that manufacturers of this and other states will stand upon the same basis. A majority of the Court think the discrimination can be removed without destroying the act. This result has sometimes been accomplished by rejecting the proviso, thereby bringing the ex-

cepted manufacturers within the general prohibition; but we are not inclined to adopt this course. The other alternative is to hold the general prohibition inoperative as to the liquors named in the proviso, thus extending the privileges of the proviso to all manufacturers of the liquors named in it. This method is certainly less objectionable as regards results, and seems to be justified by recognized rules applicable to the subject.

The propriety of the course suggested will appear from a consideration of the section as a whole. The section consists of a general prohibition regarding the sale of intoxicating liquors, with a series of exceptions as to the sale of certain liquors by certain persons. The unlawful discrimination results from the two clauses combined. So the prohibition and the exception should be viewed as one provision, any part of which may be modified, within proper limits, to relieve the provision of its unconstitutional effect. The proposed restriction in the application of the prohibitive clause will remove the discrimination, and leave the act otherwise unimpaired.

This disposition of the matter leaves the sale of wines and of cider by the barrel, when not to be drunk on the premises, unrestricted, and all other sales subject to the restraints and burdens imposed by the law. When the manifest purpose of the enactment is considered, this result cannot be objected to as something beyond the purview of the Legislature. It is entirely conceivable that if the Legislature had found any obstacle in the way of limiting the sale of cider and wines, it would nevertheless have imposed upon the sale of other intoxicating liquors every restraint embraced in this act. With the operation of the prohibitive clause restricted as indicated the act can stand, and effect in part the purpose of the Legislature.

The indictment is for the sale of intoxicating liquor without specifying the kind, and sufficiently describes an offence under the statute as above sustained.

Pro forma judgment reversed, demurrer overruled, indictment adjudged sufficient, and cause remanded.

HASELTON, J., concurs in the result.

OLIFF F. HARRISON'S ADMINISTRATOR *v.* NORTHWESTERN MUTUAL LIFE INSURANCE CO.

January Term, 1906.

Present: ROWELL, C. J., TYLER, MUNSON, HASELTON, POWERS, and MILES, JJ.

Opinion filed April 3, 1906.

Life Insurance—Wagering Policy—Assignment of Policy—Gift—Consideration—Assumpsit on Policy—Defences—Equitable Ownership.

A life insurance policy procured by a man on his own life, payable to his executors, administrators, or assigns, and obtained by him with the purpose of immediately assigning it to a person who had no insurable interest in his life, to whom he forthwith did assign it, and himself paid the renewal premiums during his life, is not a wager.

The assignment of a life insurance policy as a gift is valid without consideration.

Where, in an action at law, a judgment against the defendant will not protect him against the claim of the equitable owner of the subject-matter of the litigation, defendant may defeat plaintiff by showing such equitable ownership.

In assumpsit by an administrator on a policy of life insurance procured by the intestate on his own life and payable to his executors, administrators, or assigns, defendant offered to show that the testate had made a valid assignment of the policy; that said suit was brought against the will and interest of the assignee, on the claim that the assignment was invalid, and that since said suit was begun, the assignee had properly brought suit on the policy in her own name in another state, which suit was still pending. *Held*, that, as this showed that a judgment against defendant in this suit would not protect it against the claim of the assignee, it was error to exclude the evidence and to order a verdict for plaintiff.

GENERAL ASSUMPSIT on a policy of life insurance. Plea, the general issue with notice of special matter. Trial by jury at the September Term, 1905, Rutland County, *Watson*, J., presiding. Verdict ordered for the plaintiff, and judgment thereon. The defendant excepted.

It was conceded that the policy was regularly issued; that all the renewal premiums were paid by the testate during his life; that proper proof of the testate's death had been made to the Company; that the assignee was in no way related to the testate, and that the testate made the assignment to her spoken of in the opinion. The defendant offered to show that since the assignment, the assignee has held the policy and her copy of the assignment thereof; that since this suit was begun, she has properly brought suit in her own name in the State of New York, which suit is still pending; that the suit at bar was not brought at the request of, nor for the benefit of, the assignee, but was brought against her interest and wishes, and upon the ground that she had no interest in the avails of the policy; that the policy was procured by the testate for the purpose of immediately assigning it to the assignee, without consideration, and that the policy was assigned to the assignee by the testate as soon as he procured it, and notice thereof immediately given to the Company. The court excluded all

this evidence, and ordered a verdict for the plaintiff for the face of the policy, with interest and costs, to which the defendant excepted.

The exceptions state that: "The plaintiff contended and offered to show that the assignment was void for want of consideration and had been revoked during the life of said Harrison, and that he gave notice of said revocation to the defendant, but the court made no ruling upon this contention and offer of the plaintiff, as the case was disposed of upon other grounds."

Lawrence & Lawrence for the defendant.

The policy was a wager, and void. 13 Am. & Eng. Enc. 650; *Warnock* v. *Davis,* 104 U. S. 775; *Cammack* v. *Lewis,* 15 Wall. 643; *Crotty* v. *Union Ins. Co.,* 144 U. S. 64.

If the policy is valid and the insurance collectible, the evidence offered by defendant was clearly admissible. The policy was a chose in action, and as such, a proper subject of gift. 8 Am. & Eng. Enc. 1322; *Reed* v. *Copeland,* 50 Conn. 472.

The defendant may set up the rights of the assignee to protect itself, for this suit is brought adversely to the rights of the assignee, and against her interest, and a judgment against the defendant will afford it no protection against the claim of the assignee. *Southwirk* v. *Hopkins,* 47 Me. 362; 4 Cyc. 93, 94; *Gordon* v. *Drury,* 20 N. H. 353; *Welch* v. *Mandeville,* 1 Wheat. 233; *Mandeville* v. *Welch,* 5 Wheat. 277.

Butler & Moloney, and *F. S. Platt* for the plaintiff.

In order to be a wager, the contract must be between the company and the "assured" on the life of another person, in

whom the assured has no insurable interest. *Loomis* v. *Ins. Co.*, 6 Gray 399; *Conn. Mut. Ins. Co.* v. *Schaefer*, 94 U. S. 457; May, Ins. 398.

A person may insure his own life for the benefit of one who has no insurable interest therein. *Campbell* v. *N. E. etc. Ins. Co.*, 98 Mass. 381; *Hale* v. *Ins. Co.*, 6 Gray 172; *Forbes* v. *Ins. Co.*, 15 Gray 254; *Valton* v. *Life Ins. Co.*, 20 N. Y. 32; *Fairchild* v. *Ins. Co.*, 51 Vt. 623.

The pendency of another suit, brought by the assignee on the policy in another state, is no bar to this action. *McGilvray* v. *Avery*, 30 Vt. 538.

The administrator is the proper party to sue on the policy, and the ultimate disposal of the fund is not a matter to be litigated in this suit. *Tripp* v. *Ins. Co.*, 55 Vt. 107; *Wood* v. *Ins. Co.*, 31 Vt. 564; *Skinner* v. *Somes*, 14 Mass. 107; *Jessell* v. *Williamsburg Ins. Co.*, 3 Hill 88; Phil. Ins. 61; *Eg. L. Ins. Co.* v. *Vogel*, 76 Ala. 449; Whart. Conf. L. 1367; *Steele* v. *Conn. L. Ins. Co.*, 31 App. Sir. 390; *Sulz* v. *Mut. etc. Ins. Co.*, 145 N. Y. 563; *Mayo* v. *Eg. L. I. Co.*, 71 Miss. 590.

ROWELL, C. J. This is assumpsit on a policy of insurance procured by the intestate on his own life, payable to his executors, administrators, or assigns.

As the case is presented, it must be taken that the intestate procured the policy for the purpose on his part of immediately assigning it without consideration to Mary A. Gleason, then of Rutland but now of New York, who had no insurable interest in his life; that the policy was assigned accordingly in duplicate under seal, executed by both of the parties, for an expressed valuable consideration, and the policy and one of the assignments delivered to the assignee, who has ever since kept the same, the other assignment being sent to

the defendant company; that the intestate paid all the renewal premiums during his life, and that the assignee paid the last renewal premium; that since this suit was commenced, the assignee has properly brought suit on the policy in her own name as assignee in New York, which suit is still pending; and that the suit at bar was not brought at her request nor for her benefit, but against her will and interest, on the ground and claim that the assignment is void, and that therefore she has no interest in the avails of the policy.

This is not a wagering policy, as claimed by the defendant, for by the law of this State, as shown by *Fairchild* v. *Northeastern Mutual Life Association,* 51 Vt. 613, a policy procured by a man on his own life, in which he has an insurable interest, for the benefit of one named therein who has no such interest, and who makes no outlay in the matter, is not a wager; and by parity of reason, such a policy assigned to such a person, though taken out for that purpose, is no wager.

But the defendant says that though the policy is valid, the plaintiff ought not to be allowed to recover upon it if the assignment is good, for then he would have no right to the money if recovered, and no right to sue for it without the consent and against the will and interest of the assignee, and that therefore the defendant has a right to contest the plaintiff's title, and to show the assignment good, and thereby to defeat the action, in order to protect itself from the danger of having to pay twice.

It is true as a general proposition, that in a suit at the common law, a plaintiff who has the legal interest in the subject-matter of the litigation, cannot be defeated by showing an equitable ownership of the entire subject-matter in a third person. This proposition is based upon the ground that

a judgment against the defendant will protect him against the claim of the equitable owner. But when it will not protect him, he may contest the plaintiff's right to sue by setting up the equitable ownership in defence. This is expressly recognized in *Hackett* v. *Kendall,* 23 Vt. 275. That was an action by the bearer, on a promissory note, the equitable interest in which was in the assignee in bankruptcy of one who was the equitable owner of the note when it was given, and who sold and delivered it to the plaintiff before suit brought, without the knowledge or consent of the assignee, who never knew of the existence of the note till the trial below. The Court said that the defendant could question the right of the plaintiff to sue, for the purpose of protecting himself from a subsequent suit in the name of some one having a better right, and who had not acquiesced in that suit; but that he could not go beyond that. But in the circumstances of that case, the Court thought the defendant was in no danger from the assignee, and the plaintiff had judgment.

The same principle is recognized in *Fletcher* v. *Fletcher,* 29 Vt. 98. That was also an action by the bearers, on a promissory note. The defendant claimed that the plaintiffs had no right to the note, and consequently no right to sue upon it. The Court said that as the defendant did not deny that he owed the note and should pay it to somebody, it was immaterial to him to whom he paid, or who recovered upon it, provided that when paid or recovered upon, it would bar any further claim by others; that to that extent and for that purpose, but no farther, it was competent for him to contest the plaintiffs' title and their right to sue.

Sanford v. *Huxley,* 18 Vt. 170, was assumpsit on a note payable to the plaintiff or bearer in neat stock. The defendant pleaded equitable ownership in one Gibson. But the Court

said that as the note was payable to the plaintiff and not negotiable, the right of action was in him; and as it was not claimed that the action was prosecuted without the privity and against the will of Gibson, the plea was no defence.

So in New York under the Code, an assignee, in order to recover, must have a title that will protect the defendant against the assignor. *Hays* v. *Hathorn,* 74 N. Y. 486.

The principle of these cases applies here, and necessitates a reversal, unless we can say, as the plaintiff claims, that the assignment is void for want of consideration. But we cannot say that, for if it was a gift, as it may have been, a consideration is not essential to its validity. *Watson* v. *Watson,* 69 Vt. 243, 39 Atl. 201.

We take no note of the plaintiff's offer to show revocation, for if the assignment is revocable, as to which we say nothing, it cannot, as the case is presented, be taken to have been revoked.

Reversed and remanded.

IN RE LUKE WHITE'S WILL.

January Term, 1906.

Present: TYLER, MUNSON, WATSON, HASELTON, POWERS, and MILES, JJ.

Opinion filed April 23, 1906.

Wills—Undue Influence—Requests to Charge.

Where, in a proceeding to establish a will, the court instructed the jury that, in the circumstances of the case, the law raised a presumption of undue influence by the proponent, and that this pre-

sumption was evidence and established, *prima facie*, the fact of such influence, the contestant had no ground to complain that the court failed to grant his request for the instruction that the jury "are at liberty to infer" that the proponent had practiced fraud and exercised undue influence, or either, to procure the execution of the will.

Contestant's request for the instruction that certain facts in the case "taken together, constitute fraud and deception, in law," on the part of the proponent in procuring the testate to execute the instrument in question, and that therefore said instrument is not the last will of the testate, was properly refused, for a compliance therewith would, in effect, have taken the case from the jury.

Contestant's request for the instruction that, from the facts that proponent procured the draftsman of the instrument, was the testate's confidential adviser, and took the principal estate, "the jury are at liberty to infer" that he was attempting to practice a fraud upon the testate in securing the provision made for him in the instrument, subject to be rebutted by evidence that the will was the free and intelligent act of the testate, *held* fully complied with.

APPEAL from a decree of the probate court establishing an instrument as the will of Luke White. George Shippee, proponent, and George Rice, contestant. Trial by jury at the September Term, 1905, Windham County, *Rowell*, J., presiding. Verdict and judgment for the proponent. The contestant excepted.

The bill of exceptions discloses only the charge of the court, and contestant's exception to the alleged failure of the court to comply with the three requests mentioned in the opinion.

William Davenport, Herbert G. Barber, and *Frank E. Barber* for the contestant.

The contestant's second request should have been granted. *Davenport* v. *Johnson*, 182 Mass. 270; *Wade* v. *Pulsifer*, 54 Vt. 61; *Waller* v. *Armisteads, Admrs.*, 21 Am. Dec. 594, 2

Leighs. Rep. (Va.) 11-16; *Pool* v. *Pool,* 35 Ala. 12; *Meek* v. *Perry,* 36 Miss. 190; Bigelow, Fraud, 191; *Tyler* v. *Gardiner,* 35 N. Y. 592; *Houghton* v. *Houghton,* 15 Beav. 299-300; *Breed* v. *Pratt,* 18 Pick. 115; *Hannah* v. *Sparks,* 43 Am. Dec. 132; *Wily* v. *Tidal,* 5 Del. Ch. 194; *Garvens, Admr.* v. *Williams,* 44 Mo. 465.

Charles S. Chase, and *Clarke C. Fitts* for the proponent.

TYLER, J. This case does not present a statement of the facts that appeared in the trial, nor what the evidence on the respective sides tended to show. No exception was taken to the charge as given. The case comes here only upon the contestant's exception to the refusal of the court to charge as requested. We may assume that the facts stated in the requests were those most favorable to the contestants; they may be summarized as follows:

Luke White, the testator, was unmarried; he owned and occupied a farm in Colerain, Massachusetts, and had lived upon it many years, doing his own cooking and housework; he had long been intemperate in the use of intoxicating liquors and was, in some respects, eccentric. On Nov. 8, 1904, he went to the house of the proponent, Shippee in Halifax, this State, about four miles from his home, leaving his furniture in his house, and remained at Shippee's until his death, which occurred Jan. 29, 1905. His property, including $3,500 deposited in Massachusetts Savings Banks, amounted to $4,300.

Shippee was White's nurse and adviser during this period of nearly eight weeks, and on or about Jan. 20 he had access to his money and bank-books. On Jan. 27, by Shippee's request, one Faulkner, a man unknown to White, went to Shippee's house and drew the will and it was executed by the

testator. Shippee paid Faulkner for his services, and, without the testator's request or knowledge, directed Faulkner to hand the will to A. W. Thomas, the attending physician, who, with one Bancroft and a brother-in-law of Shippee, had witnessed the will. None of White's relatives were informed of his condition nor of his intention to make a will, and it was drawn with no one's advice but Shippee's.

The contestant was White's nephew and only legal heir; he was fifty-nine years old and in needy circumstances; his relations with his uncle had been pleasant but not intimate.

The testator was eighty-nine years old when he died; he had been confined to the house by sickness after Dec. 15 and was very sick the last fifteen days of his life.

Shippee was in the room when the will was executed and so near the testator that they could see each other's faces. Shippee was sole executor and the residuary legatee after a bequest of five dollars to said nephew. After the will was executed he took from the testator's trunk his bank-books representing about $3,500. Shippee did not suggest to the testator his making bequests to his relatives for the reason, as he testified, that he wanted all the property.

The contestant, after stating the foregoing facts, in substance, requested the court to instruct the jury as follows:

1. "You are at liberty to infer that George Shippee had practiced fraud and exercised undue influence, or either, to procure the execution of said instrument."

2. "The above facts and acts taken together, constitute fraud and deception, in law, on the part of said George Shippee, in procuring said White to execute the instrument, and therefore the instrument is not the last will of Luke White, and the contestant is entitled to a verdict, disallowing the instrument as the last will of Luke White."

3. "The jury are at liberty to infer from the facts that George Shippee procured the draftsman of the instrument, that he took the principal estate and was the confidential adviser and agent of Luke White, as testified to by him—that he was attempting to practice a fraud upon Luke White in securing the provision made for him in the instrument, subject to be rebutted by evidence that the will was the free and intelligent act of Luke White."

The court charged fully in respect to the execution of the will, the degree of mental capacity required of the testator to make a valid will, and upon the subject of undue influence. The judge said:

"Now in this case, and only for the purposes of this case, I charge you that, by reason of the relation that existed between George Shippee and Mr. White for a while before and at the time of the execution of the will, and because he takes under the will, if the will is valid, all the testator's estate save five dollars willed to George Rice, the burden is upon the plaintiff to show that he didn't unduly influence Mr. White in the making of the will. The law upon that subject as declared by a very recent decision of our Supreme Court is this, 'that the presumption of undue influence which the law raises in the circumstances, (and the law raises the presumption that Shippee did unduly influence White to make the will)—that is the *prima facie* presumption, and that presumption does more than to cast the burden of proof upon Shippee —it establishes *prima facie* the existence of undue influence and is sufficient to defeat the will unless and until that presumption is overcome by counter proof; and that presumption must be used as a piece of evidence, and thrown into the scales and weighed as such in favor of the contestant.' So that is the precise position in which the law puts that issue to start

with. In the circumstances of this case, to which I have adverted, the law makes this presumption because these circumstances are such as to raise a suspicion against the will. But as I have said upon all these issues, all the plaintiff has to do in order to make them out in his favor is to do it by a fair balance of the testimony—so that you can fairly say in your own minds, that upon all the testimony in the case bearing upon these several issues, on the whole, you more think that the issues are in favor of the plaintiff than against him. Unless you come to that degree of assurance in your mind, you cannot find these issues nor any of them in his favor."

Later in the charge the court presented to the jury the controverted question whether White went to Shippee's house under an agreement, as the latter claimed, that White should pass the remainder of his life there and that Shippee should have his property, or whether he went there, as the contestant claimed, intending soon to return to his own house, the decision of which question might aid the jury in deciding the question of undue influence.

It must be seen that the first request was complied with; indeed the charge was more favorable to the contestant than the request itself, for the jury were instructed that, in the circumstances of the case, the law raised the presumption of undue influence by Shippee, and that that presumption was evidence and established *prima facie* the fact of undue influence.

The second request could not have been complied with for it would in effect have taken the case from the jury, and, as the court charged, it was a question for the jury to determine whether or not the presumption of undue influence had been overcome by counter proof. The third request was fully complied with. If the making of the will was the carrying

out of the alleged agreement between White and Shippee there was no fraud in the acts of the latter. If he found that White was near the end of his life, he had a legal right to be active in procuring the will to be made and executed and to be personally present to see that it was properly executed, provided he did not interfere with the free operation of the testator's mind. But, on the contrary, if Shippee took advantage of the testator's enfeebled condition and unduly influenced him to make the will, then fraud was used by Shippee, and the will was not entitled to be allowed. This was a question for the jury, and it was submitted to them under careful instructions by the court. The facts proved in respect to the proponent's acts were, in the eye of the law, *suspicious*, and the jury were so instructed. *Re Wheelock's will*, 76 Vt. 235.

Judgment affirmed and certified to Probate Court.

STATE *v.* GIOVANNI VISCOME.

May Term, 1905.

Present: TYLER, MUNSON, WATSON, HASELTON, and POWERS, JJ.

Opinion filed May 11, 1906.

Homicide—Evidence—Respondent's Peaceable Character—Rebuttal—Speech of People After Homicide.

In a prosecution for murder, the respondent having introduced evidence that his character was good in respect of being peaceable, it was error to allow the State to show in rebuttal what people were saying about him after the homicide in respect of his reputation in that regard before the homicide.

INDICTMENT for murder. Plea not guilty. Trial by jury at the March Term, 1905, Franklin County, *Rowell*, J., presiding. Verdict, guilty of manslaughter, judgment and sentence thereon. The respondent excepted.

The respondent justified the homicide in self defence. It appeared that on Sunday, October 9, 1904, the prisoner was in his room where he lived and had his home, and had his gun on his shoulder and was about to go out hunting; that while the prisoner was standing with his gun thus, Frank Phillipi, the deceased, a friend and fellow-workman of the prisoner's, came into the room and asked the prisoner where he was going. The prisoner said he was going hunting. Thereupon the deceased grabbed the gun back of the prisoner, and told him he could not go hunting. The prisoner said, "My friend, let me go." But the deceased kept hold of the gun and bore down on it, and the prisoner hung on and bore down on the end, until the stock was broken from the barrel so that it hung only by a little piece of iron. Thereupon the prisoner, not liking this, threw the gun upon the floor, and told the deceased that he had broken his gun and must pay him for it or get him a new one the next day. The deceased stooped down and picked up the barrel and raised it up and said, "Since you want a new gun, I will give it to you in this way," or "I will give it to you on the head," or some such words. The prisoner said, "My friend, I will blow your brains out," or "Since you want to strike me, I will blow your brains out," or some such words and thereupon drew a revolver from his pocket and shot the deceased in the breast, inflicting a mortal wound, of which he died the same day.

W. Farrington for the respondent.

It was error to allow the State to show in rebuttal what people were saying about the respondent after the homicide, in respect of his reputation before the homicide. *Griffith* v. *State*, 90 Ala. 583, 20 L. R. A. 612; *Carter* v. *Comm.*, 2 Va. Cas. 169, 20 L. R. A. 612; *People* v. *Fong Ching*, 78 Cal. 169; 5 Am. & Eng. Enc. 860.

Warren R. Austin, State's Attorney, for the State.

MUNSON, J. The respondent having introduced evidence to show that his character was good in respect of being peaceable, the State was permitted to show in rebuttal what people were saying about him after the homicide in respect of his reputation in this regard before the homicide. The respondent excepted to this because the sayings were after the homicide instead of before.

This evidence was directed to the reputation borne by the respondent before the homicide. A witness to reputation must have knowledge regarding that of which he testifies. It is true that reputation evidence is hearsay, but it is hearsay as gathered by the witness. When the witness testifies to what common speech subsequent to the event says the respondent's reputation was before the event, it is proving hearsay by hearsay. The evidence should have been excluded.

Exceptions sustained, judgment and sentence reversed, verdict set aside, and cause remanded.

STATE v. ALMER HIER.

October Term, 1905.

Present: ROWELL, C. J., TYLER, MUNSON, and POWERS, JJ.

Opinion filed May 11, 1906.

Criminal Law—Alibi—Burden of Proof—Evidence—Convicted Accomplice—Necessity of Cautioning Jury.

In a criminal prosecution, the burden is on the respondent to establish his claim of an *alibi* by a preponderance of the evidence, and that issue may be separately submitted to the jury.

In a prosecution for larceny, it was not error to instruct the jury, in respect of the weight to be given the testimony of a convicted accomplice, that he has been convicted of the same offence, and that this was to be taken into consideration; but that nevertheless the jury might be satisfied from corroborating circumstances and the testimony of other witnesses that he had told the truth.

The rule that the court should advise the jury to be cautious about giving credit to the uncorroborated testimony of an accomplice is a rule of practice, and not a rule of law, and a failure to comply with it is not error.

INFORMATION for grand larceny. Plea, not guilty. Trial by jury at the June Term, 1905, Addison County, *Watson*, J., presiding. Verdict, guilty; judgment and sentence thereon. The respondent excepted. Robert Hays was the only witness who gave direct evidence as to the respondent being a party to the stealing of the heifer. The opinion concisely states the charge of the court in respect of the *alibi*.

William H. Bliss for the respondent.

The jury should have been cautioned as to the unreliable character of the testimony of an accomplice. 1 Bish. Crim. Law, § 972.

The court erred in instructing the jury that the burden was on the respondent to establish the alibi by a preponderance of the evidence. 1 Bish. New Crim. Proc. § § 1062, 1063; *People* v. *Hare,* 57 Mich. 505; *State* v. *Howell,* 100 Mo. 628; Warton Crim. Ev. § 333; *People* v. *Larned,* 7 N. Y. 448; *Simmons* v. *State,* 61 Miss. 243; *Williams* v. *State,* 47 Ala. 659; *Spencer* v. *State,* 50 Ala. 124; *Albin* v. *State,* 63 Ind. 598; 4 Wig. Ev. § 2512, n. 3; *Towns* v. *State,* 111 Ala. 1; *Schultz* v. *Terr.,* (Arizona) 52 Pac. 352; *People* v. *Roberts,* 122 Cal. 377, 55 Pac. 137; *People* v. *Winters,* 125 Cal. 325, 57 Pac. 1067; *McNamara* v. *People,* 24 Colo. 61, 48 Pac. 541; *State* v. *Ardoin,* 49 La. Ann. 1145; *State* v. *Harvey,* 131 Mo. 339; *State* v. *Spotted Hawk,* 22 Mont. 33, 55 Pac. 1026; *Beach* v. *State,* 51 Neb. 106, 70 N. W. 498; *Borrego* v. *Terr.,* 8 N. M. 446, 46 Pac. 349; *Wright* v. *Terr.,* 5 Okl. 78, 47 Pac. 1069; *State* v. *Thorton,* 10 S. D. 349, 73 N. W. 196.

Leroy C. Russell, State's Attorney for the State.

The burden is on a respondent in a criminal case to prove his claimed *alibi* by a preponderance of the evidence. *State* v. *Maher,* 74 Iowa 87; *State* v. *Rowland,* 72 Iowa 327; *State* v. *Rivers,* 68 Iowa 611; *State* v. *Hamilton,* 57 Iowa 596; *State* v. *Krewsen,* 57 Iowa 588; *Trujillo* v. *Territory,* 7 N. M. 43; *People* v. *Lee Sare Bo.,* 72 Cal. 623; *State* v. *Red,* 53 Iowa 69; *State* v. *Reed,* 62 Iowa 40; *State* v. *Kline,* 54 Iowa 183; *Pate* v. *State,* 94 Ala. 14; *Harrison* v. *State,* 83 Ga. 129; *Miles* v. *State,* 93 Ga. 117; *Com.* v. *Webster,* 5 Cush. 324, 52 Am. Dec. 711; *Prince* v. *State,* 100 Ala. 144; *Com.* v. *Choate,* 105 Mass. 451; *State* v. *Beasley,* 84 Iowa 83; *State* v. *Van Winkle,* 80 Iowa 15; *Briceland* v. *Com.,* 74 Pa. 463; *Rudy* v. *Com.,* 128 Pa. 500; *Watson* v. *Com.,* 95 Pa. 418; *Ledferd* v. *State,* 75 Ga. 856; *State* v. *Freeman,* 100 N.

C. 429; *People* v. *Fong Ah Sing,* 64 Cal. 253; *Ackerson* v. *People,* 124 Ill. 563; *Gallaher* v. *State,* 28 Tex. App. 247; *Carlton* v. *People,* 150 Ill. 181; *Ware* v. *State,* 59 Ark. 379; *Rayburn* v. *State,* (Ark.) 63 S. W. 356; *State* v. *Lowry,* 42 W. Va. 205.

MUNSON, J. This was an information for the larceny of a heifer. The evidence of the State tended to show that the respondent stole the heifer from a pasture in New Haven about eight o'clock in the evening of September eighteenth. The evidence of the defence tended to show that the respondent was in Vergennes during all that evening. The court instructed the jury in substance that this was evidence tending to establish an alibi; that an alibi is the best kind of defence—a full defence, for the reason that if the respondent was not where the crime was committed, he did not commit it; that they were to consider the evidence of the respondent and of all other witnesses upon that question, and all the circumstances of the case, and say whether the respondent had satisfied them by a fair balance of the evidence that he was in Vergennes at that time; that if he had satisfied them by a fair balance of the evidence that he was there at that time, that ended the case, and their verdict would be not guilty; but that if he had not satisfied them of this by a fair balance of the evidence he had failed to make out his alibi; that he knew where he was that evening and whether his defence was fabricated; that if they were satisfied beyond any question that the alibi was a fabricated defence, it was evidence, but not conclusive evidence, of his guilt—evidence to be considered with the other evidence bearing on the question; that even if they were not satisfied by a fair balance of the evidence that he was in Vergennes that evening—were not satis-

fied with his alibi, they could not throw it out of the case, but must consider it with all the other evidence, and say on the whole whether they were satisfied of his guilt beyond a reasonable doubt. The respondent excepted to the charge because it put upon him the burden of proving the alibi by a balance of testimony.

The instructions excepted to accord with the holding in *State* v. *Ward,* 61 Vt. 153 (192). The respondent questions the correctness of that decision.

State v. *Ward* is the only case we have that discusses this subject. The case of *State* v. *Cameron,* 40 Vt. 555, (564) was referred to in the discussion, but the Court was evidently in some doubt as to the precise scope of that holding. In *State* v. *Powers,* 72 Vt. 168, there was no submission of the claimed alibi as a distinct issue, and the jury were told that if the evidence in support of the alibi, when considered in connection with the other evidence, raised in their minds a reasonable doubt as to the respondent's guilt, he was entitled to an acquittal. The Court held that this was correct, but said further that it would not have been error to have instructed the jury on the subject separately from the main question, citing *State* v. *Ward.* See also *State* v. *Manning,* 74 Vt. 449 and 75 Vt. 185.

The disagreement in the cases upon this subject is well understood. Some courts hold that the question should be submitted as a separate issue, while other courts hold the contrary. This conflict of authority was understood by our Court when *State* v. *Ward* was decided. The Court having then adopted, upon full consideration, one of two rules, both of which have the support of excellent authorities, it is not deemed wise to hold now that that rule is erroneous, because of the arguments that can be made in favor of the other. But

the writer of the opinion is not favorably disposed to this method of submitting the question, as sufficiently appears from *State* v. *Powers*.

The respondent claims further that the charge failed to give him the benefit he was entitled to receive from the evidence tending to show an alibi upon a failure to find the alibi established. It is not necessary to inquire as to this, for the point is not covered by the exception taken.

The respondent excepted to the charge so far as it related "to the weight to be given to the testimony of Robert Hays and Edgar Hays." Robert Hays was an accomplice. Edgar Hays was not. There was evidence tending to show that both had given testimony upon a former trial inconsistent with their testimony upon this trial, and instructions were given upon this feature of the case. The respondent now insists that the jury should have been told that no fact could be found upon the testimony of Robert Hays. The court charged that Robert had been convicted of the same offence, and that this was to be taken into consideration; but that notwithstanding this fact they might be satisfied from corroborating circumstances and the testimony of other witnesses that he had told the truth. This was in line with the rule; and if the case was one that properly called for a more explicit caution, there was nothing in the exception taken to indicate to the court that a failure in that regard was the ground of the objection. But if the exception had been sufficient in this respect, it would not have availed the respondent. The rule referred to by counsel is a rule of practice, and not a rule of law, and a failure to comply with it is not error. *State* v. *Potter*, 42 Vt. 495; *State* v. *Dana*, 59 Vt. 614; *State* v. *Howard*, 32 Vt. 380.

Judgment that the respondent take nothing by his exceptions.

WOLFRED N. PHELPS AND LIZZIE M. PHELPS *v.* LYDIA M. ROOT.

January Term, 1906.

Present: TYLER, MUNSON, WATSON, POWERS, and MILES, JJ.

Opinion filed May 11, 1906.

Mortgages—Foreclosure by First Mortgagee — Payment by Second Mortgagee—Opening Decree—Bill to Redeem—Equitable Estoppel—Equity Pleading—Answer as Evidence—Review of Master's Findings—Evidence of Value—Unfulfilled Offer—Attorney and Client—Burden of Proof.

In a suit in equity for leave to redeem a certain farm whereof the orators were mortgagors, a bank the first mortgagee, and defendant the second mortgagee, it appeared that the bank had obtained a decree of foreclosure against the orators, the defendants, and B.; that before the expiration of the time of redemption fixed by said decree defendant orally agreed with the orators that if B. did not pay said decree defendant would pay it and give the orators a chance to redeem; that the orators had a right to and did rely upon this agreement, and made no effort to pay the decree; that in pursuance of this agreement, and partly for her own protection, defendant arranged with the bank that if said decree became absolute she would pay what the property had cost the bank, and the bank should deed it to her; that in accordance with this arrangement defendant paid the decree after it became absolute, and the bank executed and delivered to her a warranty deed of the farm; that by this arrangement neither the bank nor the defendant intended

that defendant should lose her equity of redemption in the farm, and that it was the equity of redemption and not the title to the farm that was the subject-matter of the agreement between them. *Held*, that defendant did not acquire absolute title to the farm, but that there was a waiver of forfeiture by the bank and a redemption of the farm by defendant, the effect of which was, by operation of law and regardless of said agreement between the defendant and the orators, to open the decree as to the latter and as to all persons interested in the property.

Although said agreement between the orators and defendant was oral, it appearing that the orators were willing and offered to redeem and that defendant refused to carry out the agreement, defendant is estopped in equity from denying the orators' right to redeem, notwithstanding the Statute of Frauds.

The answer to a bill in equity is evidence as far as it is a direct and explicit denial of the allegations in the bill; but if such denials are on information and belief, they are not evidence. Nor is the answer evidence of new matter therein alleged in confession and avoidance of the charge made in the bill.

Denials in an answer must be overcome by what is deemed equal to the testimony of two witnesses. But circumstantial evidence may take the place of one or both witnesses, if of equal weight and credibility.

Findings of a master will neither be reviewed nor revised where there is evidence to sustain them, unless fraud or corruption is shown.

Where there is no finding by the master that the relation of attorney and client existed between the orators and a witness produced by them, defendant's objection, on that ground, to the testimony of the witness cannot avail. On this question the burden was on defendant.

An offer by defendant to sell her farm at a specified price is evidence of its value as against defendant, notwithstanding that, because of a tenant's unexpired term, defendant was unable to fulfil the offer.

Evidence examined and held sufficient to warrant the master in making certain findings.

APPEAL IN CHANCERY, GRAND ISLE COUNTY. Heard at Chambers, July 31, 1905, on pleadings, master's report, and exceptions thereto. *Rowell*, Chancellor. Exceptions overruled. Decree of redemption for the orators "according

to the prayer of the bill and the agreement found by the master." The defendants appealed. The prayer of the bill is: "That the said Lydia M. Root may be ordered, and decreed to render an account of the rents, profits and products of said premises since she went into possession of the same, and that these complainants may be ordered and allowed to redeem said premises by the payment of the amount of said decree and the amount of said note and mortgage held as hereinbefore stated by said Lydia M. Root after deducting such rents and profits as shall have been found on an accounting from the amounts of said decree and mortgage and that these complainants may have ample time to redeem said premises in accordance with the understandings, agreements and representations of the said Lydia M. Root with and to these complainants."

The body of the letter, Exhibit 3, referred to in the opinion, is as follows: "Wolfred asked me to write you about our talk the other day. I had previously told Wolfred and Linus that I should require that the debt be reduced to six thousand dollars. Wolfred asks now for three months' time in which to make that reduction. I will agree to that if it will surely come then. The semi-annual interest at the Savings Bank they are to pay regularly and five hundred dollars yearly on the principal. This year, the first payment reducing the debt, to be reckoned in the five hundred. Wolfred said something about the payments being a little less after this year, so if they wish, we will say the yearly payment after this year be four hundred dollars instead of five. They are to pay all taxes, also put necessary repairs on the buildings, etc. Should the eighteen acres of track land be sold to the Association the purchase money is to be applied on the principal aside from the yearly payments of four or five hundred dollars (as may be

agreed upon). If the Association would be likely to make any changes that would be detrimental to the value or sale of the rest of the place, of course, I should prefer not to let them have it as was spoken of. I am glad you are coming back to South Hero to live and I hope you will be so prospered as never to regret your undertaking. Today is cold and stormy, real winter weather again. I am anxiously looking forward to Spring. I am gaining in strength but it seems to me slowly. Perhaps I am asking for too much, I know I need patience to wait.

Sincerely your friend,
L. M. Root."

Farrington & Post, and *D. G. Furman* for the orators.

The Statute of Frauds does not apply to this case. *Woodward* v. *Cowdry,* 41 Vt. 496; *Shellinberger* v. *Ransom,* 25 L. R. A. 564.

Alfred A. Hall and *Lee S. Tillotson* for the defendant.

The alleged agreement between defendant and the bank was simply an oral contract for the purchase of land, and so within the Statute of Frauds. *Scott* v. *McFarland,* 13 Mass. 311; *Lovell* v. *Leland,* 3 Vt. 581; *Wheeler* v. *Reynolds,* 66 N. Y. 227; *Levy* v. *Brush,* 45 N. Y. 589.

A *subsequent* wrongful detention of the title is not enough to take the alleged agreement out of the Statute. *Fennock* v. *Clough,* 16 Vt. 500.

WATSON, J. The Burlington Savings Bank, the owner of the first mortgage on the lands described in the bill, brought its petition to foreclose the same at the April term, 1892, of the court of chancery in the county of Chittenden, making the

orators in this case and one J. D. Beeman, the then owners of the equity of redemption, and Lydia M. Root, the defendant in this case, the owner and holder of a second mortgage, parties defendant. A decree was obtained that unless the defendants therein pay to the bank the sum of $4,167.91 with interest from the 11th day of April, 1892, to the time of payment, and costs of suit, on or before the 11th day of April, 1893, they should be foreclosed and forever barred from all equity of redemption in the premises. Payment was not made in accordance with the terms of the decree, and the title to the property, so far as appeared of record, became absolute in the bank. The master finds however that on the first day of June, 1893, this defendant, Lydia M. Root, in accordance with an arrangement made between her and the bank some considerable time before the expiration of the time of redemption as fixed by the decree, paid to the bank the full amount of the decree with interest and costs including the amount paid to its solicitor above the taxable costs, and the sum paid for recording the decree and for the deed from the bank to her, in the aggregate $4,476.93, and on or about the 8th day of the same month pursuant to the arrangement the bank conveyed the property to her.

At the time of making this payment to the bank, there was due to the defendant on the notes secured by the second mortgage $1,798.25, making with the sum paid to the bank, $6,275.18.

It is further found that as early as in November, 1892, the defendant agreed with the orators that she would assume the debt to the bank, and that in the event that Beeman did not pay the decree she would pay it and give the orators a chance to redeem and that Exhibit 3, a letter from the defendant to the orator, Lizzie M., fairly expresses the understanding and

agreement between the defendant and the orators, as finally made; that before the expiration of the time of redemption, in conformity with this agreement and partly for her own protection, the defendant made an arrangement with the bank to the effect that if the decree became absolute and the property came to it, she should pay whatever the property cost the bank at the time of deeding, and the bank would deed it to her.

The defendant claims that the agreement between her and the orators alleged in the bill and found by the master as above stated, is a contract for the sale of land and therefore within the Statute of Frauds. The master has found, however, that neither the bank nor the defendant intended to enter into any arrangement whereby she would lose her equity of redemption in the premises, and that it was the equity of redemption and not the title to the farm that formed the subject of the arrangement between them. This being so, the defendant did not acquire absolute title to the property from the bank. She was a second mortgagee and a party defendant in the suit to foreclose the first mortgage. Under the terms of the decree the time of redemption would have expired as to all defendants therein at a common specified time. Before the expiration of the time limited the bank agreed with this defendant to let her redeem after the time had expired, and deed her the property. Pursuant to this agreement, she paid the decree after it had in terms become absolute, and the bank received the money. Here was a waiver of the forfeiture by the bank and a redemption of the property by the defendant, the effect of which was, by operation of law and without regard to any agreement between the defendant and the orators for that purpose, to open the decree as to the latter and as to all persons interested in the property. *Smalley* v. *Hickok,* 12 Vt. 153; *Woodward* v. *Cowdry,* 41 Vt. 496; *Ward* v. *Seymour,* 51 Vt.

320; *Cooper* v. *Cole,* 38 Vt. 185. By the payment of the decree and the receipt of the warranty deed, the defendant obtained the same interest in and title to the premises that the bank had under its mortgage with the right in the owners of the equity of redemption to redeem. *Collamer* v. *Langdon,* 29 Vt. 32; *Oakman* v. *Walker,* 69 Vt. 344.

A decree for the orators might well be placed upon this basis, but inasmuch as the decree of redemption below was "according to the prayer of the bill and the agreement found by the master," it is necessary to consider the case with reference to the question raised upon the Statute of Frauds.

The fact is found that the defendant, after having come to the understanding and agreement with the orators as before stated and up to the expiration of the time in which the latter could redeem, never informed them or either of them that she did not intend to let them have the farm in accordance with their said understanding and agreement, and that the orators relied upon this understanding and agreement, and had a right so to rely, and so relying, made no effort to raise the money and pay the decree to the bank. The master further states that if the testimony referred to of either Mirion Landon or Fred Allen tended to show that Wolfred N. Phelps, in behalf of the orators, was ready and offered to carry out and perform the said agreement and understanding, then he finds that the orators were ready to perform and offered upon their part to perform and carry out the same. The testimony had the tendency given it, hence these facts must be considered as established. The further fact is found that the defendant on her part refused to carry out the agreement and understanding in this respect. In these circumstances, notwithstanding the agreement was oral, the defendant is estopped in equity from denying the orators' right to redeem the property. *Woodward*

v. *Cowdry,* before cited; *Turner* v. *King,* 2 Ired. Eq. 132; 38 Am. Dec. 679; *Schroeder* v. *Young,* 161 U. S. 334, 40 L. ed. 721. In the case last cited the Court, speaking through Mr. Justice Brown, said: "Defendant relies mainly upon the fact that the statutory period of redemption was allowed to expire before this bill was filed, but the court below found in this connection that before the time had expired to redeem the property, the plaintiff was told by the defendant Stephens that he would not be pushed, that the statutory time to redeem would not be insisted upon, and that the plaintiff believed and relied upon such assurances. Under such circumstances the courts have held with great unanimity that the purchaser is estopped to insist upon the statutory period notwithstanding the assurances were not in writing and were made without consideration, upon the ground that the debtor was lulled into a false security."

To the findings in the report, that the defendant agreed with the orators to assume the debt at the bank, in the event Beeman did not pay the decree, and give them a chance to redeem; that pursuant to this agreement, the defendant made the agreement with the bank; and that it was the equity of redemption and not the legal title to the farm which formed the subject of the arrangement between the bank and the defendant, exceptions were severally taken as not warranted by any evidence in the case. The relation of these facts to one another is such that the evidence bearing upon them may better be considered together. In connection therewith our attention is called to the answer. The answer is evidence as far as it is a direct and explicit denial of the allegations of the bill. But if the denials are on information and belief, it is not evidence. Or if the answer sets up other matters in confession and avoidance of the charge made in the bill, it is not evidence of such

other matters. And so far as the answer is evidence, it is to be weighed the same as it would be if it appeared in a deposition outside of defendant's pleading. The rule is well settled that denials in an answer must be overcome by what is deemed equal to the testimony of two witnesses. Yet in so doing, circumstantial evidence may take the place of the testimony of one or both witnesses, if of equal weight and credibility. *Veile* v. *Blodgett,* 49 Vt. 270; *Field* v. *Wilbur,* 49 Vt. 157. The answer as evidence is to be weighed like other evidence. It gains no factitious weight because it happens also to be one of the pleadings. As evidence it is subject to the infirmities of evidence. *McLane* v. *Johnson,* 59 Vt. 237.

On November 30, 1892, the defendant wrote a letter to the orator, Wolfred N., which appears to have been in reply to one he had previously written her, in which she says: "You must think it strange that I do not reply to your letter, but Thanksgiving, threshers and other hindrances are to blame, not me. I think I comprehend the situation and as soon as I can go to Burlington I will try to arrange to assume the matter myself, but as I understand, it must be subject to the parties during the whole year for redemption, so I cannot bar Mr. B. out from paying up if he chooses. It is to be hoped that he will not choose, but it would be strange indeed if he let it all slip out of his hands. I believe he will do something if he possibly can. * * * I shall go to B. sometime before very long and will see what can be done. Hoping for the best, I remain," etc.

Dr. Petty, the defendant's physician, testified that in the winter of 1893 he was at her house on a professional visit, and she, knowing that he was going to Burlington the next day, asked him to do an errand for her at the Burlington Savings Bank with Mr. Smith, president of the bank; that she asked

the witness to say to Smith that she would take up the mortgage which the bank held on the Phelps place; that when the witness delivered this message to Smith at the bank, he made some reply which gave the witness "the opinion" that it was satisfactory to the bank, and the witness so reported to the defendant on his next visit to her; that on the occasion last named when he reported to the defendant Smith's reply she went on to say that the reason she did this was to save herself, that she said she did not want the farm, she didn't need it, it would be a nuisance to her; that she felt sorry for Wolfred and Lizzie; that Lizzie had put her money in the farm and she was sorry to have her lose it and if Wolfred could redeem the place within five years at its cost to her she would allow him to do it; that the witness had other conversations, several times, with her during her sickness the same winter, which the witness could not repeat exactly, but "of the same drift as of the first." Linus Phelps testified that on an occasion in February, 1893, he and the orator, Wolfred N., were at the defendant's house and talked with her about the farm; that "she said she would make an arrangement or had made an arrangement, one or the other, with the bank;" that the amount she was to pay the bank or the amount of the decree was spoken about; that it was then talked between them in substance that the witness and Wolfred would not attempt to redeem from the bank, "that we should let it go, that was the understanding," "because she said that we could redeem it from her just as well." The witness had also heard her say that Wolfred could have the place by paying her what it cost her. C. P. Smith, the president of the bank, testified that the bank had an arrangement with the defendant that it would foreclose its mortgage with the understanding that she should pay the bank in case the property came to it, all that the property had cost it and re-

ceive a deed from the bank, and in short, that this arrangement was carried out.

Mirion Landon testified: "Q. What did she (defendant) say if anything in reference to the acceptance of the terms by Mr. Phelps at any of the conversations you had with her? A. She told me that her terms were acceptable to Mr. Phelps; that Mr. Phelps agreed to her terms." George Tracy testified that he talked with the defendant several times in regard to the orators' redeeming the farm, and that she said she wasn't going to turn Lizzie off, that she was going to give them a chance to redeem. "Q. Did she ever say anything to you in reference to any agreement that she had made with them or either of them in reference to the redemption of the farm in question, if so state about what she said? A. I think she has, I am quite certain she said she had agreed to give them a chance to redeem it and she was agoing to." Other evidence by way of witnesses, letters, and circumstances having the same tendency and of more or less force was before the master. In view of the evidence, the exceptions noticed must be overruled.

Exceptions were also taken upon the same ground to other findings in the report, but it is not necessary to specify in detail concerning them. It is enough to say that a careful examination of the record shows evidence sustaining all the facts found to which such an exception was taken. The rule is firmly fixed that the findings of a master will neither be reviewed nor revised where there is evidence to sustain them unless fraud or corruption is shown. *Waterman* v. *Buck,* 58 Vt. 519; *Howard* v. *Scott,* 50 Vt. 48; *Merrill* v. *Railroad,* 54 Vt. 200; *Randall* v. *Randall,* 55 Vt. 214; *Security Co.* v. *Bennington Monument Ass'n.* 70 Vt. 201.

The testimony given by A. G. Whittemore, a witness produced by the orators, was objected to, the defendant claiming that the relation of attorney and client existed between her and the witness, hence any communications between them were confidential. And the same objection was made to the admission of letters written by the witness to the defendant and by her to the witness with reference to the foreclosure, the decree, and the conveyance of the property. But this objection cannot avail, for such relation is not found to have existed. On the contrary the finding is that in respect to the foreclosure and conveyance the witness was acting under the authority and employment of the bank. On this question the burden was with the defendant. *Earle* v. *Grout,* 46 Vt. 113.

As tending to show the value of the farm, the testimony of Chlorus C. Bliss was received, subject to exception, to the effect that on May 16, 1895, he called on the defendant to see about the purchase of it and got her price which was $10,000 and she was to consult her advisor and let the witness know by letter or telegraph the next day; that she telegraphed the witness May 21 that he could have the farm as talked. But later the trade fell through because of the unexpired term of a tenant on the farm. It is urged in argument that a bare offer is not evidence of value, and that an offer without ability to perform cannot be considered as a *bona fide* offer. The evidence tended to show what the defendant considered the value to be, and like any other act of a party against his interest, was admissible.

The defendant contends that the master did not comply with the order of Chancellor Munson recommitting the report for more specific findings respecting the agreement between the orator and the defendant whereby she was to pay the decree and let them redeem, the persons between whom and the manner in which the understanding was arrived at, &c.; the date

and terms of defendant's arrangement with the bank as nearly and fully as the evidence would permit; whether Whittemore was or was not acting in this matter as attorney for defendant; and to state or refer to all the evidence upon which such findings were based in such a way as to show that the evidence so reported was all that the master relied upon. The defendant urges that this Court should see that such orders are complied with.

It is unnecessary to consider when or under what circumstances, if ever, a case would be remanded with directions for the recommittal of a master's report for such purpose. Certainly the proper determination of this case does not require it, for we think the master made a substantial compliance with the order, concluding his supplemental report by saying "a type written copy of the testimony returned herewith, which may be referred to, and the exhibits referred to, are all the evidence from which I have found any facts, and if none of the testimony or exhibits referred to tend to support any finding of fact, then I do not find such fact."

From the time the defendant received her deed from the bank she had the control and possession of the farm in question until her death, December 23, 1898, and since her death her executor has had control and possession thereof. It was not, however, deemed advisable by the parties to take the evidence for an accounting of the rents and profits until the question of the right of the orators to redeem had been decided.

Decree affirmed and cause remanded with mandate that an accounting of the rents and profits of the farm in question be had, and the sum due in equity to the defendant be ascertained. On the coming in of the report, let a decree be entered for the orators according to mandate with costs.

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ACCIDENT.

See "NEW TRIAL."

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ACCORD AND SATISFACTION.

See "PAYMENT."

An unexecuted accord is no bar to an action on the original contract. *Manley* v. *Ins. Co.*, 331.

Where a creditor accepts in satisfaction of his debt the mere promise of his debtor to do some act which he is not already legally bound to perform, that promise, though never fulfilled, constitutes an executed accord and extinguishes the debt. *Ibid.*

But a promise to perform the promisor's subsisting legal contract with the promisee, affords no consideration for the latter's promise. *Ibid.*

A promise to pay an insurance loss as originally proved *held* a mere executory accord not amounting to a satisfaction. *Ibid.*

ACTION.

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§ 1. Nature and Form.

An attachment suit against a non-resident, with no service of process upon defendant and no appearance by him, is a proceeding *in rem;* and a judgment therein, however regularly obtained, is void as a personal judgment. *French* v. *White*, 89.

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ADVERSE POSSESSION.

§ 1. Nature and Requisites.

Acts of a grantee in a deed from a town *held* acts of ownership constituting possession. *Capen's Admr.* v. *Sheldon*, 39.

A deed executed by a town *held* to give color of title to the grantee. *Ibid.*

Where the estate created by color of title and possession is conveyed, the estate passes to the grantee and gives color of title. *Ibid.*

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No inference can be drawn by a court from agreed facts, because the agreement is the voluntary act of the parties. *Mathie* v. *Hancock*, 414.

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See "CONSTITUTIONAL LAW"; "CRIMINAL LAW"; "INTOXICATING LIQUORS"; "PRINCIPAL AND AGENT"; "PAYMENT"; "NEW TRIAL"; "TRIAL."

§ 1. Presentation and Reservation in Lower Court of Grounds of Review.

An objection, without an exception, reserves no question. *Marcy* v. *Parker*, 73.

§ 2. Record and Proceedings Not in Record.

Where it appears that an instrument, though not formally offered or received in evidence, was treated by the parties as properly in the case, this Court will also so treat it. *LaValley* v. *Ravenna*, 152.

In view of the objection and bill of exceptions it is presumed that certain testimony as to condition of injured ankle at time of trial was connected with testimony as to injuries sustained. *Lewis* v. *Crane*, 216.

To reserve an available exception to the exclusion of evidence an offer must be made. *Ibid.*

Where there was no finding by the master that the relation of attorney and client existed between the orators and their witness, defendant's objection, on that ground, to the testimony of the witness cannot avail. *Phelps* v. *Root*, 493.

§ 3. Review.

Findings of a master on evidence tending to support them *held* not to be disturbed. *Smith's Admr.* v. *Smith*, 33; *Phelps* v. *Root*, 493.

Error in allowing a question was harmless where the witness answered that he did not know and had never paid much attention to the matter. *Marcy* v. *Parker*, 73.

A motion to set aside a verdict as being against the weight of the evidence is addressed to the discretion of the trial court. *Ibid.*

The Supreme Court cannot disturb a verdict based on conflicting evidence. *Lyndon Sav. Bank* v. *International Co.*, 169.

Action of plaintiff's counsel in making statements of law to the jury in his opening statement *held* not ground of exception. *Lewis* v. *Crane & Sons*, 216.

A verdict should not be directed for defendants if one count of the declaration is good and there is evidence to support it. *Ibid.*

Presence in jury room of certain models, which had not been received in evidence, *held* not ground for discharging the jury or setting aside the verdict. *Ibid.*

An objectionable statement of plaintiff's counsel in argument, based on an assumption of defendant's misconduct, *held* not reversible error. *Bushey* v. *Northrop*, 430.

ASSAULT AND BATTERY.

See "PAYMENT."

§ 1. Civil Liability.

The owner of personal property *held*, in the circumstances, not justified in using force and violence to obtain possession of it. *Stanley* v. *Payne*, 235.

ARREST,

See "BAIL"; "PROCESS."

§ 1. In Civil Actions.

An officer who arrests defendant on civil process does not, by following V. S. 1701, 1703, requiring a defendant arrested on mesne process

to be committed to jail, put it out of his power to obey the precept of the writ commanding him to produce defendant at the time and place of trial. *Gibson* v. *Holmes*, 110.

The court may order a defendant who has been arrested on civil process to be committed for want of bail after his production in court, and such commitment will be deemed to be on the original writ. *Ibid.*

Justice *held* to be without authority to permit an officer who arrested defendant to amend his return after the justice's jurisdiction in the case had lapsed. *Ibid.*

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See "ACTIONS" § 1; "BANKRUPTCY."

§ 1. Nature and Grounds.

Surrender of an officer's special property in iron attached to a purchaser *held* a sufficient consideration for the latter's promise to pay the price to the officer, entitling the officer to recover the same, though his execution had been otherwise satisfied. *Lamb* v. *Zundell*, 232.

ATTORNEY AND CLIENT.

See "ESTOPPEL." § 1.

§ 1. Retainer and Authority.

When a person commits his claim against another to an attorney for suit, he thereby invests his atorney as his agent, with large discretion and most ample authority in everything pertaining to the collection of the claim and the control and service of process; and for all acts of the attorney within the scope of this authority the client is responsible, regardless of whether they are warranted by law. *Gibson* v. *Holmes*, 110.

AUDITA QUERELA.

Where a court had no jurisdiction, and the judgment rendered is void, *audita querela* to vacate the judgment and execution thereon is unnecessary. *French* v. *White*, 89.

AUDITOR OF ACCOUNTS.

See "RECORDS"; "MANDAMUS."

BAIL.

At common law a person indicted or accused of any felony was bailable until convicted. *In Re Comolli*, 337.

At common law, in all offences less than felony, the offender is bailable, unless judgment has been rendered against him, or bail is ousted by statute. *Ibid.*

At common law no person in execution on a judgment following his conviction was bailable. *Ibid.*

The right to bail pending exceptions, under V. S. 2027, *held* within the discretion of the trial court. *Ibid.*

A person convicted of a misdemeaner, sentenced, and in the custody of the sheriff on a mittimus, *held* "in execution" within our Const. Art. 2, § 33, and therefore not entitled as of right to bail pending exceptions, though the final commitment had not been made. *Ibid.*

BANKRUPTCY.

See "EVIDENCE" § 3; "FALSE IMPRISONMENT"; "MASTER AND SERVANT."

Corporate stock deposited by a debtor as collateral security *held* not transferred either at common law or under V. S. 3689, and that the trustee in bankruptcy of the debtor is entitled thereto. *French* v. *White*, 89.

Property which vests in a trustee in bankruptcy is not subject to attachment in a state court. *Ibid.*

BANKS AND BANKING.

See "BILLS AND NOTES."

V. S. 4099 *held* not violated by an agreement extending the time of payment of a note until the payee is dissatisfied with the security, or till payment was demanded or offered. *Lyndon Sav. Bank* v. *International Co.*, 169.

BILLS AND NOTES.

See "BANKS AND BANKRUPTCY"; "PAYMENT."

§ 1. Rights and Liabilities on Indorsement and Transfer.

One who indorses a promissory note which he does not own, thereby assumes, *prima facie*, the obligation of a maker. *Lyndon Sav. Bank* v. *International Co.*, 169.

An extension of the time of payment of a note is a sufficient consideration for the indorsement thereof. *Ibid.*

Evidence considered and *held* that the nature of defendant's liability on his indorsement of a note, was a question for the jury. *Ibid.*

§ 2. Actions.

In an action by a bank on a note, *held* that it might be presumed that an extension of the time of payment had been accepted by plaintiff and approved by the Inspector of Finance. *Lyndon Sav. Bank* v. *International Co.*, 169.

In an action on a note, evidence considered and *held* sufficient to support a verdict finding that plaintiff by receiving dividends from the assets of one of the insolvent makers did not thereby release its right to collect the debt from the indorsers of the note. *Ibid.*

Finding of jury as to extension of time of payment of a note considered, and *held* not to make the instrument a demand note. *Ibid.*

The makers of a promissory note are bound by a provision therein waiving the Statute of Limitations. *Ibid.*

BONDS.

See "UNITED STATES."

The purpose of V. S. 1185-1187, relative to actions on penal bonds, is to relieve defendants in an action of debt on such bonds from having to resort to a court of equity. *United States* v. *United States Fidelity & Guaranty Co.*, 445.

V. S. 1184-1185, in reference to actions on penal bonds, does not furnish a remedy to the exclusion of an action at common law. *Ibid.*

V. S. 1184-1187 is not adapted to cases where the rights of the obligees are entirely independent of each other. *Ibid.*

BOOK ACCOUNT,

Commission due real estate brokers for their services is a proper book charge, and recoverable in an action of book account. *Reynolds-McGuiness Co.* v. *Green*, 28.

BREACH OF MARRIAGE PROMISE.

See "WITNESSES."

In an action for breach of marriage promise, it was not error to permit plaintiff to testify that when defendant proposed marriage he stated that he was worth a certain amount of money. *Massucco* v. *Tomassi*, 188.

In an action for breach of marriage promise, certain testimony of plaintiff as to representations made by defendant *held* properly admitted. *Ibid.*

In an action for breach of marriage promise, the parties having been married by religious ceremony in Italy, which ceremony was invalid, certain testimony as to conversations between defendant and a priest *held* properly admitted. *Ibid.*

Held not error to permit plaintiff to testify that excepting a certain invalid ceremony no marriage had been performed. *Ibid.*

BROKERS.

See "EXECUTORS AND ADMINISTRATORS" § 1.

A real estate broker *held* entitled to commissions, though the owner prevented a sale. *Reynolds-McGuiness Co.*, v. *Green*, 28.

A real estate broker who was promised a commission only *held* not entitled to recover expenses of obtaining a customer. *Ibid.*

CASES.

(Specially Approved, Criticised or Distinguished).

Aldrich v. *Londonderry*, 5 Vt. 441. (Overruled) *Town School Dist. of Hardwick* v. *Town School Dist. of Wolcott*, 23.

Bank v. *Smith*, 30 Vt. 148. (Approved) *Stern* v. *Sawyer*, 5.

Buchanan v. *Town of Barre*, 66 Vt. 129. (Distinguished) *Mixer* v. *Herrick*, 349.

Durant's Case, 60 Vt. 176. (Disapproved *sub modo*) *Gibson* v. *Holmes*, 110.

Fairchild v. *Northwestern Mut. Life Ins. Assn.*, 51 Vt. 613. (Approved) *Harrison's Admr.* v. *Northwestern Mut. Life Ins. Co.*, 473.

Farnsworth v. *Mount Holly*, 63 Vt. 293. (Distinguished and explained) *Skinner* v. *Weathersfield*, 410.

French v. *Osmer*, 67 Vt. 427. (Explained) *LaValley* v. *Ravenna*, 152.

Isham v. *Davis' Est.*, 70 Vt. 588. (Distinguished) *Corbin* v. *Grand Trunk Ry Co.*, 458.

Kenerson v. *Bacon*, 41 Vt. 573. (Distinguished) *Gibson* v. *Holmes*, 110.

Nelson v. *Marshall*, 77 Vt. 44. (Approved) *Massucco* v. *Tomassi*, 188.

Page v. *Weathersfield*, 13 Vt. 424. (Distinguished and explained) *Skinner* v. *Weathersfield*, 410.

State v. *Smith*, 22 Vt. 74. (Approved) *State* v. *Barr and Pianfetti*, 97.

State v. *Rowell*, 70 Vt. 405. (Distinguished) *State* v. *Webber*, 463.

State v. *Ward*, 61 Vt. 153. (Approved) *State* v. *Hier*, 488.

Sylvester v. *Downer*, 20 Vt. 355. (Approved) *Lyndon Sav. Bank* v. *International Co.*, 169.

Wade v. *Pulsifer*, 54 Vt. 45. (Approved) *Hall* v. *Turner's Est.* 62.

White v. *Stowe*, 54 Vt. 510. (Distinguished and explained) *Skinner* v. *Weathersfield*, 410.

Whitcomb v. *Cook*, 38 Vt. 477. (Distinguished) *Gibson* v. *Holmes*, 110.

CHATTEL MORTGAGES.

A chattel mortgage *held* not discharged by the taking of a mortgage on other property by the mortgagees. *Holden* v. *Gilfeather*, 405.

An agreement by lienholders for the waiver of conflicting claims *held* not affected by an attempted repudiation by one of the parties. *Ibid.*

COLLATERAL INHERITANCE TAX.

See "TAXATION."

COLOR OF TITLE.

See "PUBLIC LANDS"; "TRESPASS"; "ADVERSE POSSESSION."

COMMON LAW.

See "PLEADING" § 1.

Such English statutes as were passed before October 1, 1760, for the alteration and explanation of the common law are a part of the

common law of this State adopted by V. S. 898. *Clement* v. *Graham*, 290.

CONDITIONAL SALES.

See "SALES" § 2.

CONSPIRACY.

Indictment for conspiracy to by violence and intimidation hinder persons from continuing in the manufacture of granite *held* to charge a conspiracy to do an unlawful act at common law. *State* v. *Duncan*, 364.

CONSTITUTIONAL LAW.

See "BAIL"; "GAME LAWS"; "PHARMACY"; "POLICE POWER"; "TAXATION"; "WITNESSES."

§ 1. Construction, Operation, and Enforcement of Constitutional Provisions.

The constitutionality of an act cannot be contested by one whose rights it does not affect. *State* v. *Barr*, 97.

V. S. 1867, as amended by No. 46, Acts 1898, and No. 64, Acts 1904, *held*, not unconstitutional as depriving persons charged with non-capital felonies of liberty except "by the laws of the land," in authorizing a prosecution by information instead of by indictment. *State* v. *Stimpson*, 124.

The constitutional phrases, "the law of the land," and "due process of law" are synonymous, and mean the law in its regular course of administration through the courts. *Ibid.*

Constitutional requirements as to the manner of instituting prosecutions involving the deprivation of life or liberty, can neither be dispensed with by the Legislature nor waived by the accused. *Ibid.*

A contemporaneous and practical construction of the Constitution, acquiesced in for more than a century, affirming the right of the Legislature to exercise an important power, is strong evidence that the power is rightly used. *Ibid.*

One prosecuted for violation of No. 90, Acts 1902, regulating the sale of liquor, *held* not entitled to question the constitutionality of the search and seizure clauses of the statute. *State* v. *Paige*, 286.

An unconstitutional provision will vitiate the whole Act only when it

is such an essential element of its scheme that without it the Act would be incomplete, and inadequate to accomplish the legislative intent. *State* v. *Paige*, 286.

The constitutional provision that no one can be compelled to give evidence against himself is an option of refusal, and not a prohibition of inquiry. The immunity is a personal privilege which may be waived. *State* v. *Duncan*, 364.

§ 2. Vested Rights.

No person has a vested right in any particular course of procedure for obtaining a remedy. *Johnson* v. *Smith*, 145.

It was only as a part of the law of procedure that, before the enactment of No. 35, Acts 1902, a party who was precluded by the death of a judge from seasonably filing his bill of exceptions was entitled to a new trial, hence he could have no vested right to that remedy. *Ibid.*

No right vests in methods and procedure when not a part of the right itself. *Samson* v. *Grand Isle*, 383.

§ 3. Retrospective and Ex Post Facto Laws.

A statute which only changes the mode of judicial procedure, and in no way affects the right, has retroactive effect and applies to actions pending at its passage. *Johnson* v. *Smith*, 145.

No. 35, Acts 1902, providing that on the death of a judge of the Supreme Court any judge of that Court may allow or amend exceptions in a case tried by the deceased judge, *held* to apply to causes pending at the date the act became effective. *Ibid.*

§ 4. Privileges or Immunities and Class Legislation.

No. 128, Acts 1904, relative to hunting by nonresidents, and No. 94, Acts 1896, as amended by No. 108, Acts 1898, relative to hunting in general, *held* not to infringe the equality clause of U. S. Const. Amend. 14. *State* v. *Niles*, 266.

No. 90, § 21, Acts 1902, relating to sales of liquor, *held* not in violation of U. S. Const. Amend. 14, guaranteeing equal protection of laws, nor of Vt. Const. Ch. 1, Art. 7, prohibiting class legislation. *State* v. *Haselton*, 467.

Provisions in No. 90, § 21, Acts 1902, relating to sales of intoxicating liquor, *held* invalid as a discrimination against products of other states. *Ibid.*

CONSTRUCTIVE POSSESSION.

See "TRESPASS."

CONTRACTS.

See "EXECUTORS AND ADMINISTRATORS" § 2.

§ 1. Requisites and Validity.

To constitute a sufficient consideration, benefit to the promisee or detriment to the promisor is not necessary. It is enough that something is promised, or the exercise of a present right is forborne. *Lyndon Sav. Bank* v. *International Co.*, 169.

An agreement between the holders of liens on chattels for release of their respective claims *held* based on a sufficient consideration. *Holden* v. *Gilfeather*, 405.

To render a person liable on a promise implied in fact it must appear that he assented to the obligation; but liability on a promise implied in law exists irrespective of intention. *Mathie* v. *Hancock*, 414.

§ 2. Performance or Breach.

Defendant, a party to a logging contract, *held* not entitled to stop performance to prevent anticipated loss, without becoming accountable for the damages caused by the interruption. *Morgan* v. *Tucker*, 56.

Plaintiff failed to complete a logging contract within the time specified, because of defendant's acts in refusing to permit further cutting until logs cut had been delivered, *held* no defence to an action on the contract. *Ibid.*

CORPORATIONS.

See "BANKRUPTCY"; "PLEDGES"; "TAXATION."

Corporate Powers and Liabilities.

A corporation by accepting the benefit of an agreement made by its manager *held* estopped to deny his authority. *Lyndon Sav. Bank* v. *International Co.*, 169.

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See "ACTIONS"; "ARRESTS"; "AUDITA QUERELA"; "EVIDENCE" § 3; "PLEADINGS" § 1.

§ 1. Nature, Extent, and Exercise of Jurisdiction in General.

Property legally seized under process of a court is in its custody and possession for the time being; and no other court, unless it has superior jurisdiction, has a right to interfere. *French* v. *White*, 89.

COVENANT, ACTION OF.

See "UNITED STATES."

COVENANTS.

See "UNITED STATES."

CRIMINAL LAW.

See "BAIL"; "CONSPIRACY"; "FORGERY"; "GAMING"; "INDICTMENT AND INFORMATION" § 1; "INTOXICATING LIQUORS"; "RAPE."

§ 1. Pleas.

A plea in abatement on the ground that accused had given incriminating evidence before the grand jury *held* insufficient. *State* v. *Duncan*, 364.

Under V. S. 1127, a plea in abatement on the ground that a juror had previously acted as such within two years, *held* demurrable. *State* v. *Waterman*, 379.

§ 2. Evidence.

On a trial for selling intoxicating liquors, evidence of sales other than those charged in the information *held* admissible. *State* v. *Barr*, 97.

On a trial for a crime, officers may testify as to what they learned while making illegal searches of respondent's premises. *Ibid.*

In a prosecution for statutory rape, evidence of other acts of intercourse *held* admissible. *State* v. *Willett*, 157.

In a prosecution for statutory rape, the matter of election between several acts proved *held* within the discretion of the court. *Ibid.*

In a prosecution for keeping liquor for sale contrary to law, certain evidence, obtained by a search of respondent's premises, *held* admissible without regard to the legality of the search. *State* v. *Suiter*, 391.

In a prosecution for murder, the respondent having introduced evidence that his character was good in respect of being peaceable, it was error to allow the State to show in rebuttal what people

were saying about him after the homicide in respect of his reputation in that regard before the homicide. *State* v. *Viscome*, 485.

In a criminal prosecution, the burden is on the respondent to establish his claim of an *alibi* by a preponderance of the evidence, and that issue may be separately submitted to the jury. *State* v. *Hier*, 488.

The rule that a court should caution a jury about giving credit to the uncorroborated testimony of an accomplice is a rule of practice, and not a rule of law, and a failure to comply with it is not error. *Ibid.*

In a prosecution for larceny it was not error to instruct the jury that although an accomplice had been convicted of the same offence, yet they might be satisfied from corroborating evidence that he had told the truth. *Ibid.*

§ 3. Trial.

In charging a jury in a criminal case it is not error for the court to refuse to define the phrase "reasonable doubt." *State* v. *Costa*, 198.

In a prosecution for keeping liquors for sale contrary to law, certain argument of the State's Attorney *held* not cause for reversal. *State* v. *Suiter*, 391.

DAMAGES.

A declaration alleging injuries to plaintiff *held* broad enough to authorize evidence as to the condition of plaintiff's ankle. *Lewis* v. *Crane*, 216.

In an action for personal injuries, evidence as to defendant's wages *held* admissible on the issue of damages. *Ibid.*

DEATH.

Where an intestate would have no right of action if death had not ensued, his personal representative *held* not entitled to sue for his death, under V. S. 2451-2452. *Carty's Admr.* v. *Village of Winooski*, 104.

DEEDS.

See ESTOPPEL" § 1; "PUBLIC LANDS"; "REFORMATION OF INSTRUMENTS."

DEER.

See "GAME LAWS."

DESCENT AND DISTRIBUTION.

See "EXECUTORS AND ADMINISTRATORS" § 2.

Debts due a decedent's estate have their *situs* in the state where the debtor resides and must be administered there. *Church's Exr.* v. *Church's Est.*, 360.

Heirs of an intestate may sue to set aside a mortgage executed by intestate where administrator refuses to sue. *Marsh* v. *Marsh*, 399.

DRUGGISTS.

See "PHARMACY."

EQUITY.

See "REFORMATION OF INSTRUMENTS."

§ 1. Jurisdiction.

The probate court cannot reach property which an intestate has been fraudulently induced to convey, and consequently equity has jurisdiction to grant appropriate relief. *Marsh* v. *Marsh*, 399.

§ 2. Pleading.

A prayer *held* to ask only for the net income of property, so that a decree "according to the prayer" was proper. *Smith's Admr.* v. *Smith*, 33.

The defence of staleness can be interposed by demurrer to a bill in equity only when the objection appears on the face of the bill. *Marsh* v. *Marsh*, 399.

An answer is evidence as far as it is a direct and explicit denial of the allegations in the bill; but not, if such denials are on information and belief. Nor is the answer evidence of new matter alleged in confession and avoidance. *Phelps* v. *Root*, 493.

Denials in an answer must be overcome by what is deemed equal to the evidence of two witnesses. But circumstantial evidence may take the place of one or both witnesses. *Ibid.*

§ 3. Evidence.

In a suit by an administrator to compel defendant to convey certain land to orator, *held* that orator did not place himself in the position of one seeking relief from his own fraud, by introducing evidence that defendant requested that the title be conveyed to him in order to avoid decedent's liability on a certain bond. *Smith's Admr.* v. *Smith*, 33.

EQUITABLE OWNERSHIP.

Where, in an action at law, a judgment against the defendant will not protect him against the claim of the equitable owner of the subject-matter of litigation, defendant may defeat plaintiff by showing such equitable ownership. *Harrison's Admr.* v. *Northwestern Mut. Life Ins. Co.*, 473.

ESTOPPEL.

See "CORPORATIONS."

§ 1. By Deed.

A recital in a deed *held* not binding on a stranger. *Capen's Admr.* v. *Sheldon*, 39.

A recital in a deed *held* not binding on the granite as against strangers. *Ibid.*

Release fraudulently procured from plaintiff by her attorney *held* a bar to the cause of action when accepted and paid for in good faith by defendant. *Belheumer* v. *Thomas*, 279.

§ 2. Equitable Estoppel.

After a decree of foreclosure had been obtained against the orators and defendant, the latter orally agreed with the orators that she would pay the decree and allow them to redeem, and later she paid the decree and took a deed of the property. *Held*, that defendant was estopped in equity from denying orator's right to redeem, notwithstanding the Statute of Frauds. *Phelps* v. *Root*, 493.

EVIDENCE.

See "APPEAL AND ERROR"; "CRIMINAL LAW"; "DAMAGES"; "EQUITY"; "FALSE IMPRISONMENT"; "FRAUD"; "INTOXICATING LIQUORS"; "MASTER AND SERVANT"; "TRIAL"; "TROVER AND CONVERSION"; "WITNESSES."

§ 1. Burden of Proof.

The burden of proof is on the party asserting the affirmative of the issue. *Colston v. Bean*, 283.

The "burden of proof," in the sense of the duty of producing evidence, may shift; but the "burden of proof," meaning the obligation to establish the claim upon which plaintiff rests his case, is upon him throughout. *Ibid.*

In an action of fraud the burden of proof *held* on plaintiff. *Ibid.*

§ 2. Relevancy, Materiality, and Competency in General.

Admission of statement necessary for accurate presentation and correct understanding of matters following, *held* not error. *Smith's Admr.* v. *Smith*, 33.

In an action for injuries to a servant, certain evidence held admissible and other evidence inadmissible. *Lewis v. Crane*, 216.

In an action for an accident resulting in a stiff ankle, a physician may testify as an expert as to the nature of the stiffness, etc. *Ibid.*

Testimony *held* admissible in rebuttal as tending to show that a witness was mistaken. *Jewett* v. *Buck*, 353.

In an action at law defendant may defeat plaintiff by showing equitable ownership of the subject-matter of the litigation to be in a third person, when a judgment against the defendant will not protect him against such equitable owner. *Harrison's Admr.* v. *Northwestern Mut. Life Ins. Co.*, 473.

An offer by defendant to sell her farm at a specified price is evidence of its value as against her, although she was unable to fulfil the offer. *Phelps* v. *Root*, 493.

§ 3. Documentary Evidence.

In trespass for cutting timber, certain evidence *held* inadmissible to show the quantity cut. *Capen's Admr.* v. *Sheldon*, 39.

A recital in a deed *held* not binding on a stranger. *Ibid.*

A recital in a deed *held* not binding on the grantee as against strangers. *Ibid.*

Docket entries are no record, but only minutes from which to make a record. *Gibson* v. *Holmes*, 110.

Certified copies of docket entries made in bankuptcy court *held* inadmissible to show bankruptcy. *Ibid.*

The common law rule that a document of a public nature may be proved by copy does not apply to private documents. *Clement* v. *Graham*, 290.

Certain plan *held* properly admitted in evidence, notwithstanding its failure to show certain matters not in issue. *Marcy* v. *Parker*, 73.

A memorandum of a settlement *held* not complete, rendering parol evidence admissible. *Dunnett & Slack* v. *Gibson*, 439.

Where it appears that parties to a written contract did not intend to reduce the whole contract to writing, the omitted part may be proved by parol. *Ibid.*

EXECUTORS AND ADMINISTRATORS.

See "DEATH."

§ 1. Collection and Management of Estate.

That an executor, when employing a real estate broker, had no license from the probate court to sell the land, *held* not to affect his liability for commissions. *Reynolds-McGuiness Co.* v. *Green*, 28.

An executor not limiting his liability *held* personally liable on a contract for services for benefit of the estate. *Ibid.*

The sale of the equity of an intestate in mortgaged premises under a general license of the probate court does not establish the validity of the mortgages. *Marsh* v. *Marsh*, 399.

§ 2. Actions.

If no part of a decedent's estate has its *situs* in this State, the decedent's foreign administrator may maintain a suit in this State to collect a debt due said estate. *Church's Exr.* v. *Church's Est.*, 360.

In an action against a decedent's estate, a plea that plaintiff was a foreign administrator and not entitled to sue, *held* deficient. *Ibid.*

Compromise of certain suit by administrator *held* not to bar the maintenance of a certain other suit. *Marsh* v. *Marsh*, 399.

Plaintiff *held* not entitled to recover against his employer's administrator on a *quasi* contract for services and for feed furnished for his employer's horses after his employer's death. *Mathie* v. *Hancock*, 414.

FALSE IMPRISONMENT.

See "PROCESS."

§ 1. Civil Liability.

Under V. S. 1701, 1703, it is the duty of an officer, arresting defendant on civil process, to commit him to jail in the county where the arrest is made, and his act in committing defendant to jail in another county makes the officer a trespasser *ad initio*. *Gibson* v. *Holmes*, 110.

An attorney's action in directing the commitment of his client's debtor to the wrong prison *held* chargeable to the client, and to render the client a trespasser. *Ibid.*

Under V. S. 1075, 1076, certain return of an officer on a writ *held* insufficient to enable him to justify for making an arrest thereunder. *Ibid.*

Where plaintiff abandons his suit before entry thereof, he cannot justify under the writ on which defendant was arrested in an action by defendant for false imprisonment. *Ibid.*

Testimony that plaintiff filed his petition in bankruptcy before his arrest on civil process is insufficient to show that plaintiff was privileged from arrest because of the bankruptcy proceedings, where it is not shown when he filed the petition. *Ibid.*

FORFEITURES.

Forfeitures are odious in law, and are never presumed. *Capen's Admr.* v. *Sheldon*, 39.

FORGERY.

A document invalid on its face cannot sustain a charge of forgery at common law. *State* v. *McManus*, 433.

Under No. 115, §§ 22, 24, a physician's prescription for liquor, failing to contain a statement that the liquor was necessary for medicinal use, *held* so invalid that it could not be the subject of forgery at common law. *Ibid.*

FRAUD.

See "SALES" § 1.

Where through the fraudulent act of a third person, one of two innocent parties must suffer, he who has clothed such third person with the means of perpetrating the fraud, must bear the loss. *Belheumer* v. *Thomas*, 279.

In an action for fraud the burden of proof *held* on plaintiff. *Colston* v. *Bean*, 283.

Evidence *held* immaterial on the question of damages in an action for deceit in the sale of land. *Jewett* v. *Buck*, 353.

Evidence *held* inadmissible in an action for deceit in the sale of land; special damages not having been alleged. *Ibid.*

Evidence in an action for deceit *held* not to show knowledge by defendant. *Ibid.*

FRAUDS, STATUTE OF.

See "ESTOPPEL."

An agreement between lienholders for the release of their respective claims on chattels *held* not a sale of goods within the meaning of the Statute of Frauds. *Holden* v. *Gilfeather*, 405.

GAME LAWS.

No. 94, Acts of 1896, as amended by No. 108, Acts 1898, relative to hunting deer, *held* not wholly repealed as to nonresidents by No. 128, Acts 1904, but only repealed in so far as it is inconsistent with the latter Act. *State* v. *Niles*, 266.

The wild game in this State belongs to the people thereof in their sovereign capacity. *Ibid.*

Each resident of this State has a qualified property in the wild game therein, namely, the constitutional right to hunt and take the same, subject to proper regulations by the Legislature; but a nonresident has not even this qualified property. *Ibid.*

This difference between the respective rights of residents and nonresidents in the wild game in this State justifies that classification of our game laws which divides hunters into residents and nonresidents. *Ibid.*

GAMBLING HOUSE.

See "GAMING."

GAMING.

§ 1. Criminal Responsibility.

The repeal of the prohibitory law relating to nuisances, carried with it that part of said law relating to gambling places. *State* v. *Carrick*, 1.

At common law, it was essential that an indictment for keeping a gaming house should allege that the house was a "common" gaming house, or place. *Ibid.*

Indictment for keeping a gambling place *held* to charge no offence either at common law or under any existing statute. *Ibid.*

GRAND JURY.

See "CRIMINAL LAW" § 1.

Where at the time a person comes before a grand jury as a witness, in obedience to a subpœna duly served upon him, he is neither under arrest for, nor charged with any crime, he stands as a mere

witness, and his testimony, given without objection on his part, is properly received and considered by the grand jury, although it tends to criminate him; and said grand jury may subsequently, on the strength of such testimony, legally indict him of the crime concerning which he so testified. *State* v. *Duncan*, 364.

The law is different where a person is under arrest for, or charged with, the crime about which he is examined, and for which he is afterwards indicted; in such case he stands as a party, and not as a witness. *Ibid.*

GUARDIAN AND WARD.

§ 1. Custody and Care of Ward's Person and Estate.

A settlement between guardian and ward shortly after the ward's majority *held* void unless it is shown that the settlement was fair and that the ward acted with full knowledge. *Hall* v. *Turner's Est.*, 62.

Receipt of certain stock by a ward from his guardian, in the absence of knowledge of facts entitling him to receive his legacy in money, *held* not to constitute a satisfaction of the legacy as against the guardian's estate. *Ibid.*

A guardian and trustee, having received a legacy which she mingled with her funds, *held* liable to account therefor in money. *Ibid.*

A guardian cannot make a valid contract with her ward in respect of the trust fund. *Ibid.*

HIGHWAYS.

See "MUNICIPAL CORPORATIONS" § 2.

INDICTMENT AND INFORMATION.

See "CONSPIRACY"; "GAMING"; "INTOXICATING LIQUORS."

§ 1. Formal Requisites.

On a trial for selling intoxicating liquor, the refusal of the court to require the State to elect on which count it would seek a conviction *held* error. *State* v. *Barr*, 97.

An information charging the sale of intoxicating liquors *held* good after a verdict of guilty. *Ibid.*

In a criminal prosecution, time need not be proved as alleged, unless it is descriptive of the offence. *State* v. *Willett*, 157.

It is only when the exception in a penal statute constitutes a material part of the definition or description of the offence that it need be negatived in the information; otherwise it is matter of defence merely. *State* v. *Paige*, 286.

The legislature may prescribe the form of indictment, provided it does not contravene the constitutional provisions... *State* v. *Webber*, 463.

An indictment for perjury before the grand jury which does not specify the subject-matter of the investigation is in violation of Art. 10 of the Constitution, guaranteeing to an accused the right to demand the cause and nature of the accusation against him. *Ibid.*

An indictment must set forth the charge with such accuracy as will enable the respondent to prepare to meet it, and, if convicted, to successfully plead his conviction in a subsequent prosecution therefor. *Ibid.*

IN REM PROCEEDINGS.

See "ACTIONS" § 1.

INSURANCE.

See "ACCORD AND SATISFACTION."

A life insurance policy *held* not to have been a wager. *Harrison's Admr.* v. *Northwestern Mut. Life. Ins. Co.*, 473.

The executor of an insured in a policy payable to insured's executors, etc., cannot recover on the policy as against the defence of an existing valid assignment. *Ibid.*

The assignment of a life insurance policy as a gift is valid without consideration. *Ibid.*

INTEREST.

See "WILLS" § 3.

A claim payable immediately draws interest from the time payment should be made. *Dunnett & Slack* v. *Gibson*, 439.

INTOXICATING LIQUORS.

See "CONSTITUTIONAL LAW" § 4; "CRIMINAL LAW" § 2; "INDICTMENT AND INFORMATION" § 1.

§ 1. Criminal Prosecution.

In a prosecution for keeping intoxicating liquors for sale without a license, *held* proper to permit the State to show that at the time of the search two drunken men were wrangling over a bottle. *State* v. *Krinski*, 162.

In such prosecution, certain testimony as to the kind of bottles in which medicinal Jamaica ginger is commonly sold *held* admissible. *Ibid.*

In a prosecution for keeping for sale intoxicating liquors without a license, an instruction as to a certain preparation found on the premises *held* not erroneous. *Ibid.*

The Act of 1902 *held* not to exclude from the term "intoxicating liquor" medicinal preparations, fluid extracts, and toilet articles of which alcohol is the solvent. *Ibid.*

In a prosecution for keeping intoxicating liquors for sale without a license, the State may show that other liquors besides those relied upon were kept. *Ibid.*

In a prosecution for keeping intoxicating liquor with intent to sell the same without authority, *held* not error for the officer who searched respondent's premises to testify that he made the search by virtue of a warrant for intoxicating liquor. *State* v. *Costa* 198.

Held that respondent's claim as to the medicinal character of the alcoholic preparation found on his premises was sufficiently presented to the jury. *Ibid.*

In a prosecution for keeping intoxicating liquor with intent to sell the same without authority, it was not error to refuse to permit the manufacturer of a malt extract, found in respondent's premises, to testify as to the percentage of alcohol in other medicines made by his firm. *Ibid.*

Held proper to refuse to permit dealers to testify that they kept the malt extract, found on respondent's premises, for sale openly and visibly. *Ibid.*

In a prosecution for keeping intoxicating liquor for sale without authority, it was proper to permit the amount of alcohol and other ingredients of a preparation found in respondent's place of business to be shown. *Ibid.*

In such prosecution, as respects extracts, tinctures, essences and compounds having a legitimate use for medicinal or toilet purposes, the question is not simply whether they contain more than 1

per cent. of alcohol, but there is the further question whether they were sold to be used as a breverage. *Ibid.*

In a prosecution for keeping intoxicating liquor with intent to sell the same without authority, certain testimony *held* properly admitted as tending to show respondent's intent in selling the preparation in question. *Ibid.*

Held that an instruction that, if the preparation in question was bought and used as a beverage because of its intoxicating ingredients, it was a beverage, was not erroneous in view of other instructions. *Ibid.*

An instruction that the question was not as to the possibility of an ordinary man drinking enough of the preparation in question to intoxicate him *held* not erroneous. *Ibid.*

Under No. 90, § 21, Acts 1902, an information for illegal sale of liquor need not negative the exception of the statute. *State* v. *Paige*, 286.

An information under No. 90, Acts 1902, forbidding the sale of intoxicating liquor except in accordance with the provisions of the Act, need not show how the liquor was kept or exposed further than by following the language of the statute. *Ibid.*

Such an information need not specify the kinds of liquor kept or exposed. *Ibid.*

In a prosecution for keeping liquor for sale contrary to law, certain articles *held* admissible against respondent although found in apartment occupied by his tenant. *State* v. *Suiter*, 391.

In a prosecution for keeping liquor for sale contrary to law, it is not necessary to show that respondent ever sold any liquor. *Ibid.*

In such prosecution respondent may be convicted of two offences. *Ibid.*

One charged with keeping liquor for sale contrary to law may be convicted if he controlled the liquor, though it was owned by another. *Ibid.*

An information for keeping liquor for sale contrary to law need not state how the liquor was kept for sale. *Ibid.*

An information for keeping liquor for sale *held* to sufficiently allege where the liquor was kept for sale. *Ibid.*

An indictment for sale of intoxicating liquor is sufficient without specifying the kind. *State* v. *Hazelton*, 467.

JURY.

Treating, see "NEW TRIAL."

JUSTICES OF THE PEACE.

See "TRUSTEE PROCESS"; "ARREST."

LANDLORD AND TENANT.

§ 1. Premises, and Enjoyment and Use Thereof.

A sale of a portion of leased premises *held* not to affect the lessee's possession or enjoyment during the term, but only to entitle the lessee to an apportionment of the rent. *Stern* v. *Sawyer*, 5.

Sureties of a lessee of a hotel *held* discharged by a breach of the lessor's covenant to repair, though such breach was waived by the lessee, but without the sureties' consent. *Ibid.*

A sale of a portion of the leased premises by the lessor with the lessee's consent, but without the consent of the lessee's sureties, *held* to discharge the sureties. *Ibid.*

LARCENY.

See "CRIMINAL LAW" § 2.

LIFE INSURANCE.

See "INSURANCE."

LIMITATIONS OF ACTIONS.

See "BILLS AND NOTES" § 2.

The Statute of Limitations may be waived by agreement. *Lyndon Sav. Bank* v. *International Co.*, 169.

MANDAMUS.

Under V. S. 898, St. of Anne, Ch. 20, relating to pleading in mandamus, *held* a part of our common law. *Clement* v. *Graham*, 290.

V. S. 1617-1620 in effect extends the Statute of Anne to all cases of mandamus. *Ibid.*

The pleadings in mandamus are governed by the same rules as apply in ordinary actions at law. *Ibid.*

In mandamus proceedings, under our practice, the complaint takes the place of the alternative writ, the answer the place of the return,

and subsequent pleadings may be had till issue is joined on the merits. *Ibid.*

Defects in a complaint in a mandamus proceeding pertaining to relator's right to recover cannot be taken advantage of by motion to dismiss; but such defects may be taken advantage of by motion to quash at any time before the issuance of the peremptory writ. *Ibid.*

A complaint to compel the State Auditor to permit an inspection of vouchers in his office *held* not defective for failure to state how the alleged duty so to exhibit was created, nor facts showing whether it arose from contract or express provision of law. *Ibid.*

A complaint for mandamus against the State Auditor to compel him to permit an inspection of vouchers, which he is required by V. S. 305 to keep on file in his office, *held* not objectionable for failure to allege that such vouchers were on file at the time of demand and refusal. *Ibid.*

A complaint for mandamus showing that complainant had no other adequate remedy *held* not objectionable for failure to so allege in terms. *Ibid.*

Material facts in a complaint for mandamus denied only on information and belief, and facts alleged which defendant neither admitted nor denied but called for proof, *held* admitted. *Ibid.*

The State Auditor's ministerial duty to permit an inspection of claims and vouchers on file in his office may be enforced by mandamus, though his office is a branch of the executive department. *Ibid.*

Mandamus to compel the State Auditor to permit an inspection of books and papers *held* not deniable as matter of discretion. *Ibid.*

To maintain mandamus to compel a public officer to perform his duties, the relator need not have any pecuniary or other interest in the subject-matter, except such as he has as a citizen taxpayer. *Ibid.*

MASTER AND SERVANT.

See "TRESPASS."

§ 1. Master's Liability for Injuries to Servant.

In an action for injuries to a servant, certain evidence held admissible and other evidence inadmissible. *Lewis* v. *Crane*, 216.

In an action for the death of a railroad engineer caused by a collision, evidence *held* insufficient to show negligence on the part of train dispatcher. *Mahoney's Admr.* v. *R. R. Co.* 244.

Failure of railroad telegraph operator to transmit report of departure of extra train to dispatcher *held* proximate cause of a collision between the extra and a regular train. *Ibid.*

In an action for injuries to a railroad brakeman by striking a low bridge of which he had knowledge, plaintiff *held* to have assumed the risk. *Johnson* v. *R. R. Co.*, 344.

In an action for injuries to a brakeman by being struck by a low bridge, evidence *held* insufficient to show that he was struck by ice on the bridge, or that more ice than usual had accumulated thereon. *Ibid.*

A railroad brakeman *held* not entitled to recover for injuries sustained by the negligence of a fireman in throwing fresh coal into the furnace, contrary to custom, while the train was on a down grade. *Ibid.*

In an action for injuries to a locomotive engineer in a collision between his train and another *held* a question for the jury whether the other engineer failed to stop at a switch because he did not know where he was, and whether prudence required that one having more knowledge of the road should have been placed in charge of the engine. *Russ* v. *Ry. Co.*, 424.

In an action for injuries to a locomotive engineer owing to a train having run upon a switch, certain facts *held* not sufficient to fasten the opening of the switch upon the members of the crew of plaintiff's train. *Ibid.*

MORTGAGES.

See "CHATTEL MORTGAGES."

After a decree of foreclosure against herself and the orators had become absolute, defendant paid the decree and took a deed of the property. *Held* that, in the circumstances, she thereby opened the decree as to the orators and all persons interested in the property. *Phelps* v. *Root*, 493.

MUNICIPAL CORPORATIONS.

See "POLICE POWER."

§ 1. Contracts in General.

A municipal corporation may be liable on an implied promise. *Town Dist. of Hardwick* v. *Town Dist. of Wolcott*, 23.

§ 2. Torts.

A municipality constructing and maintaining a jail, as authorized by V. S. 5302-5304, *held* not liable for negligence to one committed therein, as provided by V. S. 5305. *Carty's Admr.* v. *Village of* Winooski, 104.

Adjoining owner *held* liable for injuries to a pedestrian by a defect in the covering of a hole in the sidewalk in front of his property only on proof of negligence. *Mixer* v. *Herrick*, 349.

Allegations in a declaration in an action for injuries to a pedestrian by an alleged defective covering of a hole in a sidewalk *held* sufficient to show notice to defendants of the defect. *Ibid.*

Liability for injuries caused by an obstruction or excavation made in a public street with the consent of municipal authorities having power to grant it, rests upon the ordinary principles of negligence, as the initial act is not wrongful. *Ibid.*

A notice to the selectmen of an injury occasioned by a defective bridge *held* sufficient under V. S. 3492. *Skinner* v. *Weathersfield*, 410.

NEGLIGENCE.

See "Railroads" § 2; "Master and Servant"; "Municipal Corporations" § 2.

Negligence is a shortage of legal duty that causes injury. *Corbin* v. *R. R. Co.*, 458.

In an action against a railroad company for injuries to one who attempted to cross between the cars of a train which was obstructing a crossing, *held* that, even if the obstructing of the crossing was unlawful, it does not follow that this was a negligent act in respect of plaintiff. *Ibid.*

The mistake of plaintiff in misconstruing a signal, and his consequent attempt to cross a train obstructing a highway crossing, *held* to be the sole proximate cause of his injury. *Ibid.*

NEW TRIAL.

See "Constitutional Law" § 2.

§ 1. Grounds.

Misconduct of defendant and jurors in conversing *held* not available to defendant as a ground for setting aside the verdict, where he did not disclose the circumstances to the court until after verdict. *Jennett* v. *Patten*, 69.

Affidavits of jurors will not be received to impeach their verdict. *Marcy* v. *Parker*, 73.

V. S. 1662, places no limitations on Supreme Court as to the grounds upon which new trials may be granted. *Massucco* v. *Tomassi*, 188.

Defendant *held* entitled to a new trial on the ground of accident, under V. S. 1662. *Ibid.*

Accident defined. *Ibid.*

V. S. 1232, making the treating of a jury ground for a new trial *held* not applicable to a criminal case. *State* v. *Costa*, 198.

A respondent is to be awarded a new trial where there is sufficient reason to believe that a verdict has been returned against him in consequence of corruption practiced upon the jury by an officer or anyone else. *Ibid.*

On a criminal prosecution, *held* that there was nothing in the nature of corruption or impropriety in permitting the jury to partake of a supper at the expense of the State after having returned their verdict. *Ibid.*

Averments in an affidavit for a new trial on the ground of newly discovered evidence that affiants "used due diligence," without stating the facts, *held* insufficient. *Comolli* v. *State*, 423.

NOTICE.

See "MUNICIPAL CORPORATIONS" § 2.

OFFICERS.

See "ARREST"; "ATTACHMENT"; "COURTS"; "CRIMINAL LAW" § 2; "FALSE IMPRISONMENT"; "PRINCIPAL AND AGENT"; "PROCESS"; "RECORDS."

PARTIES.

See "DESCENT AND DISTRIBUTION"; "PLEADING" § 2.

PARTNERSHIP.

See "PAYMENT."

§ 1. Rights and Liabilities as to Third Persons.

V. S. 1179 *held* not to authorize a judgment against only one of the partners of a firm on a showing of joint liability. *Armour & Co.* v. *Ward & Co.*, 60.

In an action of assumpsit, brought against defendants "as individuals or as partners," defendants are not entitled to have plaintiff elect whether he will proceed against them as individuals or as partners. *Lewis* v. *Crane*, 216.

In an action of assumpsit, brought against defendants "as individuals or as partners," plaintiff may inquire into the business relations of defendants between themselves. *Ibid.*

The arrangement between the debtor of a firm and a partner *held* not binding on the firm in the absence of the copartner's assent thereto. *Dunnett & Slack* v. *Gibson*, 439.

PAYMENT.

In an action for assault, a request to charge that a note given and received in payment thereof is "*prima facie* payment" *held* properly refused. *Belknap* v. *Billings*, 214.

The arrangement between the debtor of a firm and a partner *held* not to operate *prima facie* as a payment of a sum due the firm. *Dunnett & Slack* v. *Gibson*, 439.

PHARMACY.

The sale at retail of drugs, medicines, and poisons is included in the practice of pharmacy. *State* v. *Abraham*, 53.

V. S. 4662 as amended by No. 112, Acts 1902, and a part of V. S. 4663, relating to the sale of drugs by licensed pharmacists and others, *held* invalid. *Ibid.*

PHYSICIANS AND SURGEONS.

See "EVIDENCE" § 2.

PLEADING.

See "APPEAL AND ERROR" § 3; "DAMAGES"; "EQUITY" § 2; "GAMING"; "INDICTMENT AND INFORMATION" § 1; "MANDAMUS."

§ 1. Form and Allegations in General.

Allegations which are only conclusions of law from facts stated are not traversable. *Clement* v. *Graham*, 290.

That which already sufficiently appears in the pleading of either party need not be expressly averred. *Ibid.*

St. 4 Anne, Ch. 16, § 4, authorizing the pleading of several defences, *held* a part of our common law. *Ibid.*

An allegation in a complaint for mandamus as to defendant's duty to exhibit certain vouchers, *held* a conclusion not traversable. *Ibid.*

Courts are bound to take notice of all common law rights and duties and of all general customs, hence they ought not to be stated in pleading. *Ibid.*

§ 2. Pleas.

The non-joinder of a party defendant is matter of abatement, and cannot be taken advantage of under the general issue. *Armour & Co.* v. *Ward & Co.*, 60.

In a suit against a firm, a defect of parties, consisting of failure to serve one of the partners, *held* waived by pleading to the merits. *Ibid.*

A plea in abatement on the ground that accused had given incriminating evidence before the grand jury, *held* insufficient. *State* v. *Duncan*, 364.

A plea in abatement must anticipate and exclude all supposable matter that would defeat it. *State* v. *Waterman*, 379.

§ 3. Demurrer.

A demurrer to a declaration containing one good count should be overruled. *Mixer* v. *Herrick*, 349.

§ 4. Motions.

Duplicity in a declaration is ground for demurrer, but not for a motion to compel an election. *Lewis* v. *Crane*, 216.

PLEDGES.

"Assignment," when used with reference to the pledging of corporate stock, means a written transfer. *French* v. *White*, 89.

To constitute a valid pledge of corporate stock, there must be delivery of the certificate and a written transfer sufficient to pass title, or power of attorney to make such transfer. *Ibid.*

POLICE POWER.

The police power is a governmental function inherent in every sovereignty. *Carty's Admr.* v. *Village of Winooski*, 104.

This power may be delegated by a state to municipal corporations. *Ibid.*

The maintaining of a lockup by a municipality under the provisions of V. S. 5302-5304, is but the exercising of a delegated portion of this police power, and, therefore, the municipality is not liable at common law for negligence therein. *Ibid.*

PRINCIPAL AND AGENT.

No officer of the State can make himself an agent of the State in respect of practices forbidden by the State. *State* v. *Costa*, 198.

PRINCIPAL AND SURETY.

See "LANDLORD AND TENANT."

Any change in a contract for the fulfilment of which a surety is bound, made between the debtor and creditor without the consent of the surety, whether prejudicial to him or not, discharges the surety. *Stern* v. *Sawyer*, 5.

PROBATE COURT.

See "EQUITY" § 1; "EXECUTORS AND ADMINISTRATORS."

PROCESS.

See "ARREST"; "FALSE IMPRISONMENT."

§ 1. Service and Return.

To "make return according to law" is not only to return the precept to the authority issuing it, but also to return with it a statement by the officer of all his doings in executing it, which statement must show that he has obeyed every lawful command of the process and of the statute, otherwise the return will be insufficient for his protection. *Gibson* v. *Holmes*, 110.

An officer's neglect to make a proper return is not a mere nonfeasance, any more than his neglect to return at all would be. *Ibid.*

Instead of saying that the want of a return, or an insufficient return makes an officer a trespasser *ab initio*, it is more accurate to say that a sufficient return is necessary to make the arrest or return lawful *ab initio*. *Ibid.*

When the authority of an officer is special in respect of imprisoning one whom he has arrested on *mesne* process in a civil case, he must imprison accordingly, and if he imprisons elsewhere or otherwise, he is a trespasser. *Ibid.*

It is the right of a person arrested on *mesne* process in a civil action to be committed to jail in the county where he was arrested, in default of exposing property or procuring bail. *Ibid.*

PROXIMATE CAUSE.

See "MASTER AND SERVANT" § 1; "NEGLIGENCE."

PUBLIC DOCUMENTS.

See "RECORDS."

PUBLIC LANDS.

Conveyances in fee of public lands when the statute authorizes only leases reserving rent are void as conveyances, but may give color of title. *Capen's Admr.* v. *Sheldon*, 39.

A condition in the charter of a town granting lands to the proprietors *held* a condition subsequent, enforceable by the State alone. *Ibid.*

The legal title to land granted to individuals of a town *held* to vest in the town. *Ibid.*

QUO WARRANTO.

A complaint for *quo warranto* is addressed to the discretion of the Court, and when applied for by a private relator, who had caused liquor to be furnished to voters at the poles, will be denied on the ground of public policy. *Pomeroy* v. *Kelton*, 230.

RAILROADS.

See "MASTER AND SERVANT"; "NEGLIGENCE."

§ 1. Operation.

It is the duty of a railroad company to exercise a reasonably efficient supervision of its tracks and trains, with a view to lessening perils incident to the work. *Mahoney's Admr.* v. *R. R. Co.*, 244.

In an action for an injury at a railroad crossing, facts considered, and *held*, that the injured person was guilty of contributory negligence. *Guilmont's Admr.* v. *R. R. Co.*, 185.

In an action for an injury at a railroad crossing, facts considered and *held* that no negligence appeared. *Ibid.*

An engineer has the right to assume that a person approaching the track will not drive in front of the train. *Ibid.*

In an action for injuries caused by plaintiff's horse becoming frightened at the escape of steam from defendant's locomotive, evidence *held* insufficient to establish negligence on defendant's part. *Powers* v. *R. R. Co.*, 436.

A railroad company *held* not liable for injuries to one who attempted to cross between the cars of a train which was obstructing a crossing. *Corbin* v. *R. R. Co.*, 458.

RAPE.

See "CRIMINAL LAW" § 2.

In a prosecution for statutory rape, testimony as to complaint of the prosecutrix *held* not erroneous as in effect naming the respondent as the person complained of. *State* v. *Willett*, 157.

In a prosecution for statutory rape, the refusal of an instruction asked and the giving of another instruction as to proof of alibi *held* proper. *Ibid.*

REASONABLE DOUBT.

See "CRIMINAL LAW" § 3.

RECITALS.

In Deeds, see "ESTOPPEL" § 1.

RECORDS.

Bills and vouchers filed in the office of the Statute Auditor, as required by V. S. 305, *held* thereafter to be public documents. *Clement* v. *Graham*, 290.

A citizen and taxpayer *held* entitled to an inspection of the claims and vouchers on file in the office of the State Auditor as a matter of right. *Ibid.*

V. S. 230, as amended by No. 21, Acts 1904, *held* not to deprive a citizen taxpayer of the right to inspect the records of the State Auditor's office. *Ibid.*

The Auditor of Accounts may make and enforce reasonable regulations regarding the inspection of the public records in his office. *Ibid.*

REFERENCE.

In a suit by an officer for the price of property attached, it was immaterial that general assumpsit would not lie; the declaration

being adaptable by amendment to the facts found. *Lamb* v. *Zundell*, 232.

REFORMATION OF INSTRUMENTS.

Equity will not correct a mistake in a written instrument, except on clear and undoubted proof. *Abbott* v. *Flint's Admr.*, 274.

Equity will reform a deed in respect to a mistake in description. *Ibid.*

RELEASE.

See "ESTOPPEL" § 1.

SALES.

See "FRAUDS, STATUTE OF."

§ 1. Modification or Recission of Contract.

Evidence *held* to present question for the jury whether buyer rescinded contract for false representations by seller within a reasonable time. *Ward* v. *Marvin*, 141.

Buyer of a horse, by use thereof after discovering fraud of seller, *held* to have waived his right to rescind the contract. *Ibid.*

§ 2. Conditional Sales.

In a conditional sale, the buyer's promise to pay is not conditioned on the seller's ability to deliver title when the debt is due. *LaValley* v. *Ravenna*, 152.

Seller of a horse, retaining title till balance due thereon was paid, *held* entitled to recover such balance, notwithstanding death of horse in mean time. *Ibid.*

SCHOOLS AND SCHOOL DISTRICTS.

No. 23, Acts 1900, *held* not applicable to a case where the question is one of liability of a town for tuition for its children attending schools of another town. *Town Dist. of Hardwick* v. *Town Dist. of Wolcott*, 23.

An implied contract to pay by a town tuition for its children attending the schools of another town *held* shown by the evidence. *Ibid.*

Certain acts of a town *held* not to vest in the inhabitants the right to have certain high school instruction continued. *Samson* v. *Grand Isle*, 383.

Under No. 37, Acts 1904, town school directors have a discretion in determining the manner in which they will provide high school instruction. *Ibid.*

SEARCHES AND SEIZURES.

See "INTOXICATING LIQUORS"; "WITNESSES."

SHERIFFS AND CONSTABLES.

See "ARREST"; "ATTACHMENT"; "FALSE IMPRISONMENT"; "PRINCIPAL AND AGENT"; "PROCESS"; "TROVER AND CONVERSION."

STATE AUDITOR.

See "MANDAMUS"; "RECORDS."

STATUTES, CONSTRUCTION OF.

See "BANKS AND BANKING"; "CONSTITUTIONAL LAW"; "CRIMINAL LAW"; "GAME LAWS"; "INTOXICATING LIQUORS"; "MANDAMUS"; "POLICE POWER"; "RECORDS."

A Statute which only changes the mode of judicial procedure for the inforcement of a right has retroactive effect. *Johnson* v. *Smith*, 145.

STATUTES CONSTRUED.

Acts Cong. Aug. 13, 1894. *United States* v. *United States Guaranty & Surety Co.*, 445.
Acts 1896, No. 46. *In Re Hickok's Est.*, 259.
Acts 1898, No. 46. *State* v. *Stimpson*, 124.
Acts 1898, No. 108. *State* v. *Niles*, 266.
Acts 1900, No. 23. *Town Dist. of Hardwick* v. *Town Dist. of Wolcott*, 23.
Acts 1902, No. 35. *Johnson* v. *Smith*, 145.
Acts 1902, No. 90, § 21. *Mixer* v. *Herrick*, 349.
Acts 1902, No. 90. *State* v. *Hazelton*, 467.
Acts 1902, No. 112. *State* v. *Abraham*, 53.
Acts 1904, No. 21. *Clement* v. *Graham*, 290.
Acts 1904, No. 37. *Samson* v. *Town of Grand Isle*, 383.
Acts 1904, No. 64. *State* v. *Stimpson*, 124.
Acts 1904, No. 115, §§ 22, 24. *State* v. *McManus*, 433.
Acts 1904, No. 128. *State* v. *Niles*, 266.

Const. Ch. 1, Art 5. *Carty's Admr.* v. *Village of Winooski*, 104.
Const. Ch. 1, Art. 9. *In Re Hickok's Est.*, 259.
Const. Ch. 1, Art. 10. *State* v. *Webber*, 463.
Const. Ch. 2, Art. 33. *In Re Comolli*, 337.
St. 4 Anne, Ch. 16, § 4. *Clement* v. *Graham*, 290.
V. S. 305. *Clement* v. *Graham*, 290.
V. S. 320. *Clement* v. *Graham*, 290.
V. S. 898. *Clement* v. *Graham*, 290.
V. S. 1075, 1076. *Gibson* v. *Holmes*, 110.
V. S. 1127. *State* v. *Waterman*, 379.
V. S. 1179. *Armour & Co.* v. *Ward & Co.*, 60.
V. S. 1184-1187. *United States* v. *Fidelity & Guaranty Co.*, 445.
V. S. 1224. *Reynolds-McGuiness Co.* v. *Green*, 28.
V. S. 1232. *State* v. *Costa*, 198.
V. S. 1246. *Jennett* v. *Patten*, 69.
V. S. 1374. *Lamb* v. *Zundell*, 232.
V. S. 1662. *Massucco* v. *Tomassi*, 188.
V. S. 1701. *Gibson* v. *Holmes*, 110.
V. S. 1703. *Gibson* v. *Holmes*, 110.
V. S. 1867. *State* v. *Stimpson*, 124.
V. S. 2027. *In Re Comolli*, 337.
V. S. 2326, 2327. *Church's Exr.* v. *Church's Est.*, 360.
V. S. 2451, 2452. *Carty's Admr.* v. *Village of Winooski*, 104.
V. S. 3492. *Skinner* v. *Town of Weathersfield*, 410.
V. S. 3689. *French* v. *White*, 89.
V. S. 4099. *Lyndon Sav. Bank* v. *International Co.*, 169.
V. S. 4554. *State* v. *Carrick*, 1.
V. S. 4662, 4663. *State* v. *Abraham*, 53.
V. S. 5135. *State* v. *Carrick*, 1.
V. S. 5302-5305. *Carty's Admr.* v. *Village of Winooski*, 104.
V. S. 5417, form 49. *State* v. *Webber*, 463.

STRUCK JURY.

V. S. 1127, providing that a person drawn from a town of more than two hundred inhabitants to serve as a petit juror is disqualified from again serving as juror for two years from such drawing, does not apply to struck juries. *State* v. *Waterman*, 379.

TAXATION.

§ 1. Constitutional Requirements and Restrictions.

Exemptions from taxation are to be strictly construed. *In Re Hickok's Est*, 259.

Exemptions from taxation are not in contravention of constitutional provisions requiring uniformity and equality of taxation. *Ibid.*

§ 2. Inheritance Tax.

The acquisition of property by descent or will is not a natural right, but a privilege accorded by the State. *In Re Hickok's Est.*, 259.

Inheritance taxes are not taxes upon property, but taxes upon the transmission of property. *Ibid.*

Const. Ch. 1, Art. 9, providing for proportionate contributions to the expense of the protection which the State affords, *held* not contravened by No. 46, Acts 1896, taxing collateral inheritances. *Ibid.*

Foreign corporations *held* not within the exemption, relative to charitable, educational and religious societies, in No. 46, Acts 1896, which takes collateral inheritances. *Ibid.*

TOWNS.

See "MUNICIPAL CORPORATIONS"; "PUBLIC LANDS"; "SCHOOLS AND SCHOOL DISTRICTS."

TRESPASS.

Ab initio, See "FALSE IMPRISONMENT" § 1; "PROCESS" § 1.

§ 1. Actions.

Constructive possession by virtue of color of title is a sufficient possession to maintain trespass against a stranger. *Capen's Admr.* v. *Sheldon*, 39.

In trespass by one having constructive possession, the fact that the boundary line of the land had been in dispute for a long time *held* immaterial. *Ibid.*

In trespass for cutting timber, the refusal to more fully instruct as to what would be required to make the person who cut the timber the servant of defendants *held* error. *Ibid.*

TRIAL.

See "APPEAL AND ERROR" § 3.

§ 1. Reception of Evidence.

A party *held* properly permitted to testify in rebuttal to the adverse party's evidence varying the terms of a writing. *Dunnett & Slack* v. *Gibson*, 439.

An objection to evidence must be made when it is first offered. *Ibid.*

§ 2. Argument and Conduct of Counsel.

Action of plaintiff's counsel in making statements of law to the jury in his opening statement *held* not ground of exception. *Lewis* v. *Crane*, 216.

Evidence *held* to authorize argument that defendant had failed to produce papers that were or ought to have been in his possession, and that it might be inferred therefrom that there was something wrong with the transaction. *Bushey* v. *Northrop*, 430.

TROVER AND CONVERSION.

Possession is a sufficient title to maintain trover against a stranger. *Marcy* v. *Parker*, 73.

In trover against a sheriff for the conversion of lumber standing in the yard of a third person, a certain contract, leases, and deed between the third person and plaintiff *held* admissible in evidence. *Ibid.*

In trover for the conversion of lumber, evidence *held* sufficient to show that plaintiff was in actual possession of the lumber at the time of the conversion. *Ibid.*

In trover, burden *held* on defendant to show title in some other person and to connect himself with such person. *Ibid.*

A sale by defendant of an ox under a lien theretofore reserved *held* a tortious appropriation for which trover lay. *Holden* v. *Gilfeather*, 405.

TRUSTEE PROCESS.

An officer suing to recover the purchase price of property sold by him after attachment, *held* the "representative" of the attachment defendant, within V. S. 1374, entitling the purchaser to plead payment of a judgment in trustee proceedings in discharge under the general issue. *Lamb* v. *Zundell*, 232.

Plaintiff in a trustee suit *held* entitled to an appeal from a justice's judgment sustaining a claimant's title to credits disclosed, amounting to more than $20., though the suit was not appealable as between plaintiff and defendant. *Howard* v. *Gammon*, 420.

TRUSTS.

§ 1. Management and Disposal of Trust Property.

Unless modified by statute, a conveyance by a trustee, whether to an innocent purchaser or not, and whether in contravention of the trust or not, vests the title in the grantee. *Capen's Admr.* v. *Sheldon*, 39.

UNITED STATES.

Contractor's bond given under Act. Cong. Aug. 13, 1894, need not name the laborers and materialmen for whose benefit it is given. *United States* v. *United States Fidelity & Guaranty Co.*, 445.

A covenant contained in a contractor's bond given under Act. Cong. Aug. 13, 1894, is several, and the bringing of an action on such a bond by one materialman is no bar to an action by another. *Ibid.*

Action by materialman on such bond *held* properly brought in the name of the United States as covenantee. *Ibid.*

Contractor's bond given under Act. Cong. Aug 13, 1894, *held* to constitute several covenants to pay materialmen and laborers for material and labor furnished by them. *Ibid.*

The common law action of covenant rather than action under V. S. 1184, 1185, 1187, *held* the proper remedy to enforce the bond of a contractor for a public building given under Act. Cong. Aug. 13, 1894. *Ibid.*

The Act. Cong. Aug. 13, 1894, does not give laborers and materialmen a mere remedy, but confers upon them rights of action, leaving them to enforce those rights under the laws and practice of the states where the suits are brought. *Ibid.*

VESTED RIGHTS.

See "CONSTITUTIONAL LAW" § 2.

VILLAGES.

See "MUNICIPAL CORPORATIONS."

WILLS.

§ 1. Actions to Establish.

In an action to establish a will *held* that the court sufficiently complied with contestant's request to instruct the jury that they "are at liberty to infer" that the proponent had practiced fraud and exercised undue influence. *In Re White's Will*, 479.

In an action to establish a will, contestant's request for the instruction that certain facts in the case "taken together, constitute fraud and deception in law" *held* properly refused. *Ibid.*

§ 2. Construction.

Determination of an issue as to identity of a legatee constitutes a judgment of construction, and not a finding of fact. *In Re Welch's Will*, 16.

Such issue is to be determined by the language of the will, aided by proof of the circumstances in which the testatrix used the language, but without inquiring further as to her purpose. *Ibid.*

Facts *held* to require a finding that testatrix in bequeathing a legacy to her neice "Harriet Ellen Hubbard," had reference to her neice "Harriet Ella Field," and not to her neice "Harriet Anna Hubbard." *Ibid.*

§ 3. Rights and Liabilities of Devisees and Legatees.

Pecuniary legacies draw interest after one year from the death of the testator, unless the will provides otherwise. *In Re Woodward's Est.*, 254.

This rule applies notwithstanding delay is caused by litigation instituted by such legatees. *Ibid.*

WITNESSES.

See "GRAND JURY."

§ 1. Examination.

A party is not concluded by the testimony of his own witnesses. *Jennett* v. *Patten*, 69.

Under V. S. 1246, plaintiff may call defendant as his first witness and then examine other witnesses, although their testimony contradicts that given by defendant. *Ibid.*

The hostility of a witness by showing statements out of court *held* not provable unless a proper foundation is laid by inquiring of him whether he made the statements. *State* v. *Bardelli*, 102.

In an action for breach of marriage promise, *held* not error to permit plaintiff to testify on redirect examination that she did not claim to be defendant's legal wife, having been married only in a church in Italy. *Massucco* v. *Tomassi*, 188.

In a prosecution for keeping intoxicating liquor with intent to sell the same without authority, the officer who searched respondent's premises may use the return to the search warrant to refresh his recollection. *State* v. *Costa*, 198.

In a prosecution for keeping intoxicating liquor with intent to sell the same without authority, respondent may cross-examine the officer who made the search from the return to the search warrant. *Ibid.*

A party cannot object to the re-examination of a witness on matters which he himself has brought out on cross-examination. *Lewis* v. *Crane*, 216.

The immunity from giving self-incriminating testimony is a personal privilege which may be waived, and which is waived if not seasonably asserted. *State* v. *Duncan*, 364.

This privilege is the witness's and he alone can assert it. *Ibid.*

Nor is it requisite, in order to constitute a waiver of this privilege, that the witness be notified thereof, and warned of the possible consequence if he gives testimony criminating himself; though such notice and warning are usually given. *Ibid.*

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